









A TREATISE

ON THE

Law of Boundaries and Fences

INCLUDING THE

Rights of Property on the Sea-Shore and in the
Lands of Public Rivers and other Streams,

AND THE

LAW OF WINDOW LIGHTS.

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P R E F A C E.

THE growing importance of the subjects treated in the following pages makes it probable, in the judgment of the writer, that a work devoted especially to their consideration will be found convenient and useful, and may meet with favor from the legal profession. It has been often and truly observed, that a large proportion of the litigation in this country respecting the title to real property arises in cases of disputed boundaries; and yet, hitherto, the law by which such questions are governed has remained scattered through innumerable volumes, the most of which are inaccessible to the major part of the profession. It is obvious, therefore, that a work in which the law upon the subject is all brought together, and within reasonable limits, must be desirable to the practitioner, and be the means of much saving of time and expense.

So, also, litigation and dispute are constantly arising in respect to the maintenance of *fences* in the country, and, from an excusable want of familiarity with the law upon the subject, the most capable lawyers find it necessary in most cases, when applied to, to consult statutes and digests to a tedious degree, in order to be able to give the appropriate advice. The same remark, therefore, may be made in respect to this as to the subject of boundaries: a book in which the law relating to fences is concisely exhibited cannot fail to be convenient and acceptable to the practitioner. And, finally, the rules and regulations relating to the right to window lights, or the right to light and air, so important in the old world, are

becoming of no inconsiderable interest on this side of the Atlantic, and this interest must necessarily increase with the growth and age of the country. Even at the present, grave questions, involving the right to light and air, are often presented to the courts for adjudication, making it desirable that the law upon the subject should be ready of access, and reasonably well understood. Notwithstanding their importance, no American work has been heretofore produced in which any of these subjects has been specially treated, and the object of the following pages is to supply this supposed want. There have been published two or three very small English books upon the subject, but they are so filled with the consideration of the local policy of Great Britain that they are really of little or no value to the American practitioner. What I have found in those works, however, which I deemed of any service, I have freely extracted and incorporated into my own work; endeavoring to give, in all cases, the proper credit. But what is much more important, I have made it a point to consult all the American statutes and judicial decisions upon the subjects treated, and especially those of the most recent date, and then state the law, as it is settled, in plain, clear and concise language, so that the same may be comprehended without reference to other authority. It has been my aim to produce a book which shall not only be convenient, but which may be depended upon; and, to this end, I have spared neither labor nor pains in searching for the latest authorities, and have endeavored to extract the doctrine of the cases with scrupulous care. I believe that my labors will be appreciated by the courts and the profession, to whom they are confidently committed.

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The Law of Boundaries, Fences and
Window Lights.

PART I.

OF THE LAW OF BOUNDARIES.

CHAPTER I.

DEFINITION OF THE TERM BOUNDARY — PRELIMINARY OBSERVATIONS IN RESPECT TO THE SUBJECT OF BOUNDARY — GENERAL PRINCIPLES APPLICABLE TO THE DESCRIPTION OF BOUNDARIES.

THE word boundary, as it will be used in the following pages, signifies the line which fixes the limits of any specified territory, or piece or parcel of land or real estate, or it may be defined to be the ascertained limits of adjoining lands owned by different proprietors. The meaning of the term as explained in Burrill's Law Dictionary is, "a line or object indicating the limit or furthest extent of a tract of land or territory. A separating or dividing line between countries, States, districts of territory, or tracts of land, consisting sometimes wholly of one or more natural objects, as a river, a chain of lakes, etc.; sometimes of artificial erections, as a stone wall, fence, and the like; sometimes of an imaginary line drawn from one principal *terminus* to another, and indicated along its course by prominent natural or artificial objects standing or erected upon it at intervals, and sometimes of all these in combination." After citing authorities, the definition is further continued: "A line or connected series of lines going around a territory or tract of land and inclosing it on all sides. A tract or country may be said to be bounded by a *single line* running in various directions from one point to another, so as to surround it, but it is more common to use the plural *boundaries* as descriptive of a *series of lines* of various lengths, traced out either by natural objects or by courses and distances, or by both, running in various directions from one point to another; such *points* (sometimes called in surveys *corners*, and anciently *butts*) being usually designated by some conspicuous object, as a rock, a tree, a stake, a heap of stones, etc." (1 *Burrill's Law Dictionary*, title *Boundary*). Obviously, the line which marks the confines or division of two contiguous or adjacent estates is the boundary of such adjoining estates.

A boundary may be known by taking a line between two fixed points or objects, or it may be marked by stakes erected at inter

vals, and at the discretion of any of the proprietors may be permanently distinguished or fenced by a wall or a chain, according to the nature of the soil. The word fence is properly applicable to the inclosure of lands by walls, chains or hedges, for the purpose of agricultural improvement, or of preventing trespass (1 *Furlong's Landlord and Tenant*, 696). To render a thing capable of being appropriated, it is not strictly necessary that it should be inclosed, or capable of being restrained within artificial bounds, or such as are different from its own existence; it is sufficient if the compass and extent of it can be determined (*Schultes on Aquatic Rights*, 118).

As a general rule, the boundary between the lands of adjoining owners is to be settled by the conveyances under which they hold. Exceptions exist in some cases of practical location and the like, but ordinarily resort must be had to the written or documentary evidence of the title. And here it may be observed that words in an instrument of grant, as elsewhere, are to be taken in the sense which the common usage of mankind has applied to them in reference to the context in which they are found. For example, if lands granted are described as bounded by a house, no one would naturally suppose that the house was included in the grant; but if the land granted is described as bounded by a highway, it would be equally unnatural to suppose that the grantor designed to reserve to himself the right to the soil *ad medium filum*, for the simple reason that in a majority of cases the fee of the land covered by the road would be of no possible use to one having no interest in the adjacent soil. The rule upon this subject has been thus judicially stated: "Whenever land is described as bounded by other land, or by a building or structure, the name of which, according to its legal and ordinary meaning, includes the title in the land of which it has been made a part, as a house, a mill, a wharf, or the like, the side of the land or structure referred to as a boundary is the limit of the grant; but when the boundary line is simply by an object, whether natural or artificial, the name of which is used in ordinary speech as defining a boundary, and not as describing a title in fee, and which does not in its description or nature include the earth as far down as the grantor owns, and yet which has width, as in the case of a way, a river, a ditch, a wall, a fence, a tree, or a stake and stones, then the center of the thing so running over or standing on the land is the boundary of

the lot granted" (*The City of Boston v. Richardson*, 13 Allen's R., 144, 154). This is the general rule of construction, and it was well illustrated in the elaborately considered case in Massachusetts in which it is thus stated.

Another general rule of construction is, that definite boundaries given in a deed will limit the generality of a term previously used, which, if unexplained, would have included a greater quantity of land. And when the boundaries mentioned in a deed of conveyance are inconsistent with each other, those are to be retained which best subserve the prevailing design manifested on the face of the deed; and the least uncertainty must yield to the greater certainty in the description. Again, every call in the description of the premises in a deed must be answered if it can be done; and the intention of the parties is to be sought by looking at the whole, and none is to be rejected if all the parts can stand consistently together. If there be a precise and perfect description, showing that the parties actually located the land upon the earth, and another, general in its terms, and they cannot be reconciled to each other, the latter should yield to the former. But when there is inaccuracy or deficiency in the particular description, the one which is general often becomes important, and renders that clear which, without it, would be obscure and uncertain. These general principles are well understood, and have been so frequently recognized by the courts, that the citation of authority need not be made.

In locating lands the following other general rules are resorted to, and usually in the following order: First, natural boundaries. Second, artificial marks. Third, adjacent boundaries. Fourth, course and distance. Neither rule, however, occupies an inflexible position; for, when it is plain that there is a mistake, an inferior means of location may control a higher. When land is located, the line is to be run according to the boundary, and the boundary is to be observed, though the courses are different. But when there is some doubt about the natural boundaries, and this doubt can certainly be removed by artificial marks, the latter will have effect, although of inferior degree. And where no monuments are named in a grant, and none are intended to be afterward designated as evidence of the extent of it, the distance stated therein must govern the location.

In accordance with the principle of construction that what is *most material* and *most certain* in a description shall prevail over

that which is *less material* and *less certain*, it is a general rule that course and distance must yield to natural and ascertained objects; as a river, a stream, a spring or a marked tree; or, in other words, that course and distance must yield to natural, visible and ascertained objects. The rule, however, that monuments control in boundaries is not inflexible; and in a case where no mistake can reasonably be supposed in the courses and distances, the reason of the rule will fail, and the rule itself will not be applied. As an illustration, the Supreme Judicial Court of Massachusetts long since decided that a line of "one foot and three inches," in describing land on one of the main streets of Boston, should control the boundary mentioned (*Davis v. Rainsford*, 17 *Mass. R.*, 207). But where the boundaries of land are fixed, known and unquestionable monuments, although neither courses nor distances nor the computed contents correspond, the monuments must govern. The authorities upon this point are very numerous, and they are so uniform that they need not be cited. Preference is said to be given to monuments because they furnish greater certainty of description. And, also, because such preference is most beneficial to the grantee in giving him more land. These monuments may be either natural or artificial objects; but natural objects are preferred over artificial ones, simply because they are regarded, as a rule, to be more lasting and permanent.

A false or mistaken particular in a conveyance may be rejected, where there are definite and certain particulars, sufficient to locate the grant. But *prima facie*, a fixed visible monument can never be rejected as false or mistaken, in favor of mere course and distance, as the starting point, when there is nothing else in the terms of the grant to control and override the fixed and visible call. The general rule that courses and distances must yield to natural or artificial monuments or objects is upon the legal presumption that all grants and conveyances are made with reference to an actual view of the premises by the parties. And where the grammatical sense of the words is not in harmony with the obvious intention of the parties, one word will be substituted for another for the purpose of giving effect to such intention. And still another general proposition may be stated in connection with this subject, which is, that the description of boundaries in a deed is to be taken most strongly against the grantor. This is a well settled rule, and is uniformly applied.

These are the only observations relating to the question of boundary of a preliminary nature which it is important to make. The rules of construction as applied to different conveyances, and the species of evidence proper in cases of boundary, will be more elaborately considered in subsequent chapters.

CHAPTER II.

THE RIGHTS OF PROPERTY ON THE SEA-SHORE — HOW THE SAME MAY BE AFFECTED BY GRANTS OR PRESCRIPTIONS — THE LAW OF BOUNDARY WITH REFERENCE TO THESE RIGHTS — WHAT IS THE BOUNDARY OF PRIVATE PROPERTY BORDERING ON THE SEA.

IN order to be able to determine the boundary of lands upon the sea-shore and other navigable waters, it is requisite to understand the law in respect to the soil under these waters. By the law of nature, the air, running water, the sea, and consequently the shores of the sea, are common to all mankind. No one, therefore, is forbidden to approach the sea-shore, provided he respects habitations, monuments and buildings, which are not, like the sea, subject only to the law of nations. This is the rule of the civil law upon the subject (*Institutes, lib. II, tit. 1, p. 1*). And by the same authority, it appears that the use of the sea-shore is as public, and as much subject exclusively to the law of nations, as the sea itself, so that any person would seem to be at liberty to place on it a cottage to which he may retreat, or to dry his nets there, and haul them from the sea; for the shores may be said to be the property of no man, but are subject to the same law as the sea itself and the land or ground beneath it. That is to say, this is the rule laid down in the *Institutes (Instit., lib. II, tit. 1, p. 5)*.

The law of England upon this subject differs somewhat from the civil law. By the former, the soil of the sea, of estuaries and of navigable rivers was originally in the crown, and the law is the same now, except in those cases where it can be proved to have been transferred to a subject (*Hale de Jure Maris, 12, 25; Malcolmonson v. O'Dea, 10 House of Lords Cases, 593*). But the rule in Scotland is different. There, the sea-shore is not, as in England, held to be property reserved to the sovereign, but is presumed to be granted a part and pertinent of the adjacent

land, under the burthen of the crown's right, as trustee for the public use (*Bell on Law of Scotland*, 251).

The law of the American States upon this subject is the same as that in England. That is to say, by our law, whatever soil below low-water mark is the subject of exclusive propriety and ownership belongs to the State on whose maritime border, and within whose territory it lies, subject to any lawful grants of that soil by the State, or the sovereign power which governed its territory before the declaration of independence. This doctrine was distinctly declared by the Supreme Court of the United States in a case decided in 1842, wherein the claim was for lands lying beneath the navigable waters of the Raritan river and bay, where the tide ebbs and flows, and the principal right in dispute was the property in the oyster fisheries in the public rivers and bays of East New Jersey. The rules of the common law were elaborately examined and commented upon, and the remarks of Hale when speaking of the navigable waters, and the sea on the coasts within the jurisdiction of the British crown, were referred to and approved, wherein it is said: "That although the king is the owner of this great coast, and, as a consequent of his propriety, hath the primary rights of fishing in the sea and creeks, and arms thereof, yet the common people of England have regularly a liberty of fishing in the sea, or creeks, or arms thereof, as a public common of piscarry, and may not, without injury to their rights, be restrained of it, unless in such places, creeks or navigable rivers, where either the king or some particular subject hath gained a propriety exclusive of that common liberty" (*Hale's Treatise de Jure Maris*, *Hargrave's Law Tracts*, 11). This principle stated by Hale is not questioned by any English writer upon the subject. But the question as to the power of the crown since Magna Charta to grant to a subject a portion of the soil covered by the navigable waters of the kingdom, so as to give him an immediate and exclusive right of fishery within the limits of his grant, is not entirely free from doubt, although Chief Justice Taney, who delivered the prevailing opinion of the court in the case under consideration, thought the question must be regarded as settled in England against the right of the crown since Magna Charta to make such a grant. The point, however, did not arise in the case, and the learned chief justice remarked: "And we the more willingly forbear to express an opinion on this

subject, because it has ceased to be a matter of much interest in the United States. For when the Revolution took place, the people of each State became themselves sovereign; and in that character held the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since accorded by the constitution to the general government" (*Martin v. Waddell*, 16 *Peters' R.*, 367, 410). The court seem to have adopted the doctrine of a case previously decided by the Supreme Court of New Jersey, in which it was held that navigable rivers, where the tide ebbs and flows, and the ports, bays and coasts of the sea, including both the waters and the land under the water, are common to the people of New Jersey (*Arnold v. Munday*, 1 *Halsted's R.*, 1). And the same general doctrine has been subsequently affirmed by the Supreme Court of the United States. It was held in 1845, that the shores of navigable waters and the soils under them were not granted by the Constitution of the United States, but were reserved to the States respectively; and that the new States have the same rights, jurisdiction and sovereignty over this subject as the original States (*Pollard v. Hagan*, 3 *Howard's R.*, 212). And in a more recent case the same court held that whatever soil below low-water mark is subject to exclusive ownership, belongs to the State within whose limits it lies; and that the State may make regulations concerning its use and concerning any fisheries upon it (*Smith v. Maryland*, 18 *How. R.*, 71). It is, therefore, well settled, that the sea and its arms are peculiarly and pre-eminently in the State, in respect to their uses; all of which, at common law, are public, and they are held by the sovereign power for the public benefit, that is to say, navigation, fishing, the moving of vessels, which is subject to the *jus preventionis* (*Vide Angell on Tide-waters*, 158).

The rule which governs in respect to the sea and the soil under it applies also to the shore. What constitutes the shore is different under different systems of law. By the civil law, the shore extends as far as the greatest winter flood runs up. But this is not the doctrine of the common law upon the subject. By that, the shore is that portion of the land adjacent to the sea that is between ordinary high-water and low-water mark, and which is alternately covered and left dry by the ordinary flux and reflux of the tides (*Vide Hale de Jure Maris*, 12; *Hall on Sea shore*, 8;

Blundell v. Catterall, 5 *Barn. & Ald. R.*, 292; *Harvey v. Mayor of Lyme Regis*, 4 *L. R., Exch.*, 260).

The line of demarkation between the sea-shore and the land of the adjoining proprietor above is the line of the medium high tide between the springs and the neaps. This was so decided by the High Court of Chancery of England some twenty years ago, after much discussion, in a case in which Lord Chancellor Cranworth was assisted by Mr. Justice Maule and Mr. Baron Alderson. His lordship, in rendering his opinion, said: "The principle which gives the shore to the crown is, that it is land not capable of ordinary cultivation or occupation, and so is in the nature of unappropriated soil. Lord Hale gives, as his reason for thinking that lands only covered by the high spring tides do not belong to the crown, that such lands are, for the most part, dry and maniorable; and, taking this passage as the only authority at all capable of guiding us, the reasonable conclusion is that the crown's right is limited to land which is, for the most part, not dry or maniorable. The learned judges, whose assistance I had in this very obscure question, point out that the limit indicating such land is the line of the medium high tide between the springs and the neaps. All land below that line is more often than not covered at high water; and so may justly be said, in the language of Lord Hale, to be covered by the ordinary flux of the sea. This cannot be said of any land above that line; and I therefore concur with the able opinion of the judges, whose valuable assistance I had, in thinking that medium line must be treated as bounding the right of the crown" (*The Attorney-General v. Chambers*, 4 *De Gex, McN. & Gordon's R.*, 206, 217, 218; *S. C.*, 27 *Eng. Law and Eq. R.*, 242).

The common-law doctrine, as to what constitutes the shore of the sea, is recognized in the American States; and it has been repeatedly held that the sea-shore is that ground which lies between the ordinary high-water mark and low-water mark; or, in other words, the space between high and low-water mark (*Storer v. Freeman*, 6 *Mass. R.*, 435, 439; *Cutts v. Hussey*, 3 *Shepley's R.*, 237). And it has been before shown, that the common-law rule, that all the shore below ordinary high-water mark belongs to the sovereign power of the State (*vide Martin v. Waddell*, 16 *Peters' R.*, 367; *Pollard v. Hagan*, 3 *How. R.*, 212; *Arnold v. Mundy*, 1 *Halst. R.*, 1; *Commonwealth v. Charles-*

town, 1 *Pickering's R.*, 180, 182; *Storer v. Freeman*, 6 *Mass. R.*, 435, 438).

This, clearly, is the doctrine in respect to the sea and all arms of the sea; and it has been held that the same doctrine applies also to navigable rivers. But at common law only arms of the sea, and streams where the tide ebbs and flows, are deemed navigable. Streams above tide-water, although navigable in fact, are not deemed navigable in law. The title of a riparian proprietor of land, bounded by a navigable river or the sea, extends only to high-water mark; that is to say, this is the rule at common law (*Middleton v. Pritchard*, 3 *Scammon's R.*, 510). What is regarded as high-water mark is the line of the medium high tide between the springs and the neaps, and does not extend to land overflowed only at high spring tides.

It has sometimes been questioned whether private individuals can gain a right to the soil of the sea-shore, either by charter or grant, or by long continued possession. Says Mr. Hall, in the appendix to his work on the Sea-shore: "It may be a question whether it ought ever to have been in the power of the crown to alienate by grants to individuals any portions of the sea-shore of the realm; and it may be still more questionable whether such alienation ought ever to have been presumed in a court of law, when no grant whatever could be produced. It may be thought that prescription, or presumption of law, ought in no case to be allowed to prevail against the title of the crown to so important a trust, confided by the law to its charge for the good of the commonwealth. If the king were to make the sea-shores of the realm a source of private sale and profit, he would be acting contrary to the trust for which the ownership of the shore was vested in the crown by the common law. Still less, therefore, ought private individuals to be aided, by presumption of law, in their claims upon the shore when the crown and public are both thereby greatly impoverished" (*Hall's Essay on Sea-shore*, 296). Mr. Hall was a legal writer of considerable repute fifty years ago; and even now his work on the Rights of the Crown and Privileges of the Subject in the Sea-shores of the Realm, is regarded as very good authority, although some of the rules governing the subjects which he there discusses have been somewhat modified, if not entirely changed, since his treatise was written. For example, it is now well settled that the shore may belong to a private indi-

vidual, and that the soil of the sea-shore may be acquired in the same manner that other rights in real property are gained. The shore may belong to a private individual in gross, which possibly may suppose a grant before the time of memory, or it may be part and parcel of a manor, subject in all cases to the rights which the public possess of using the shore for the purpose of fishing; for it was under this burden while in the hands of the sovereign, and will, therefore, remain so in the hands of its grantee, unless the latter can establish an exclusive right of fishing in himself, arising from a grant or long continued enjoyment (*Vide Hale de Jure Maris*, 26, 27; *Fitzpatrick v. Robinson*, 1 *Hudson & Brooke's R.*, 585). But all grants of the sea-shore by the crown of England to a subject must have had a date anterior to the statutes now existing, restraining the alienation of crown lands (*Hall on Sea-shore*, 118). It has been held, however, that juries must be directed to presume an ancient lost grant from the crown from long continued acts of ownership exercised on the sea-shore by the adjoining proprietor (*Mayor of Kingston v. Homer*, 1 *Cowper's R.*, 102, 215; *In re Belfast Dock Act*, 1 *Irish Eq. R.*, 128; *Re Alston's Estate*, 5 *W. R.*, 189; 1 *Taylor's Evidence*, 4th ed., 140). The acts which are relied upon as evidence of a lost grant of the shore are commonly the facts of constantly and usually fetching gravel, and sea-weed and sea-sand, between the high-water and low-water mark, and licensing others to do so; inclosing and embanking against the sea, and the enjoyment of what is so inclosed; the enjoyment of wrecks happening upon the sand; the presentment and punishment of *purpresture* in the Court of the Manor, and the like (*Hale de Jure Maris*, 27; *vide Culmady v. Rowe*, 6 *Com. Bench R.*, 861; *Duke of Beaufort v. Mayor of Swansea*, 3 *Exchequer R.*, 413; *Le Strange v. Rowe*, 4 *Foster & Fin. R.*, 1048; *Phear on Water*, 89). But it has been held that if the acts are not continuous, but only occasional, and have always been the subject of dispute, they will not form a sufficient ground for presuming a lost grant; and it has been held that the mere user of the sea-shore by the turning on of cattle, although without interruption for the period of sixty years, was not such an act of ownership as to raise a presumption of title in the owner of the cattle, inasmuch as the sea-shore is property of such a nature that it cannot be easily protected against intrusion; and even if it could, it would not be worth the trouble and expense of fencing

it. Knowledge or acquiescence on the part of the person interested in resisting the right claimed, or perseverance in the assertion and exercise of the right in the face of opposition on his part, must be proved in such case to enable the claimant to establish his title (*Livett v. Wilson*, 3 *Bing. R.*, 115; *Attorney-General v. Chambers*, 4 *De G. & J's R.*, 55).

The shore has been held to pass under a grant of the wastes of a manor. In a recent case there was a grant in fee of all coals and coal mines found or to be found within the commons, waste lands, or marish grounds within the lordship of E., with full power and authority to dig, search for, and sink pits, and open the mines in all places convenient within the said commons, waste grounds and marishes, for the getting of coal within the lordship. The shore was part of the manor, and it was held that the coals under the shore passed to the grantee, and that the word "waste" was a sufficient description of the soil between high and low-water marks (*The Attorney-General v. Hammer*, 4 *Jurist*, N. S., 751, and *vide Attorney-General v. Jones*, 33 *Law Journal*, *Exchequer*, 249). It seems that the shore may also pass under the word "*ripa* or bank," or under the words "anchorage and groundage" (*In re Belfast Dock Act*, 1 *Irish Eq. R.*, 128, 140; *The Stranger v. Rowe*, 4 *Fos. & Fin. R.*, 1048; *Calmady v. Rowe*, 6 *Com. Bench R.*, 891). And according to Lord Hale and Lord Coke, where there has been a grant by the crown to the lord of a manor or other person of the rights to take wreck, there is a *prima facie* presumption that the sea-shore itself was also intended to pass, inasmuch as a ship cannot be a wreck, within the legal meaning of the term, without being cast upon the land, and that between high and low-water mark (*Hale de Jure Maris*, 27; *Constable's Case*, 5, *Coke's R.*, 107; *Calmady v. Rowe*, *supra*; *Rex v. Ellis*, 1 *Maule & Selw. R.*, 662; *vide Round on Riparian Owners*, 14). According to other writers, however, the right to wreck is merely a franchise, carrying with it no right to the soil or shore (*Phear on Water*, 52; *Hall on the Sea-shore*, 81-99).

According to the latest English authorities the right to a several fishery *prima facie* imports the ownership of the soil of the sea, or river where the right of fishing is exercised (*Somerset v. Fogwell*, 5 *Barnwell & Creswell's R.*, 875; *Holford v. Bailey*, 8 *Queen's Bench R.*, 1000; *S. C.*, 13 *ib.*, 427). This is regarded by a modern elementary writer as opposed to sound principles, and

he expresses the opinion that the decisions which lay down this doctrine will be overruled should the point come before a court of appeal for consideration (*Paterson on the Fishing Laws*, 65). And some remarks have been made in a recent case before the English Queen's Bench in favor of the adoption of a different rule than that which commonly prevails upon the subject. Lord Chief Justice Cockburn, in the course of his opinion in the case, observed: "It is admitted on all hands that a several fishery may exist independently of the ownership of the soil in the bed of the water. Why, then, should such a fishery be considered as carrying with it, in the absence of negative proof, the property in the soil? On the contrary, it seems to me that there is every reason for holding the opposite way. The use of water for the purpose of fishing is, where the fishing is united with the ownership of the soil, a right incidental and accessory to the latter. On a grant of the land the water and the incidental and necessary right of fishing would necessarily pass with it. If, then, the intention be to convey the soil, why not convey the land at once, leaving the accessory to follow? Why grant the accessory that the principal may pass incidentally? Surely such a proceeding would be at once illogical and unwlawyer-like. The greater is justly said to comprehend the less, but this is to make the converse of the proposition hold good. A grant of land carries with it, as we all know, the mineral which may be below the surface. But who ever heard of a grant of the mineral carrying with it the general ownership of the soil? Why should a different principle be applied to the grant of a fishery, which may be said to be a grant of that which is above the surface of the soil, as a grant of the mineral is a grant of that which is below it? Nor should it be forgotten that the opposite doctrine involves the startling and manifest absurdity that should the water be diverted by natural causes or become dry, the fishing, which was the primary and principal object of the grant, would be gone, and the property in the soil, which only passed incidentally and as accessory to the grant of the fishery, would remain" (*Marshall v. Ulleswater Steam Navigation Co.*, 3 *Best & Smith's R.*, 732, 748; *S. C.*, 6 *ib.*, 570; *vide Hall on Sea-shore*, 45-81). This is certainly sound reasoning and correct doctrine, and although the decision does not necessarily overrule the other authorities upon the subject, the doctrine of the remarks of the learned chief justice must ultimately be the doctrine of the courts.

It is said by a very respectable English writer: "It must be remembered that the soil of the sea is not susceptible of transfer till it becomes convertible or derelict" (*Schultes on Aquatic Rights*, 110). In support of this proposition Mr. Schultes refers to Bacon's Abridgment, title "Prerogative," B, where a case is quoted in which there was a grant by the crown of the manor of Holbeck, with its appurtenances. In the letters-patent were the following words: *Necnon totum illud fundum, et solum, et terres suas contigue adjacent, to the premises, quae sunt aquâ coopertâ, vel quae in posterum de aquâ possunt recuperari, etc., non obstante non nominando valorem qualitatem sive quantitatem, etc.* Some 100 of acres having been recovered from the sea, it was a question whether they passed by the patent. Notwithstanding the strong language of the grant, the court held that the patent as to those 100 acres which became derelict was void (*The Attorney-General v. Sir Edward Farnen*, 2 *Levinz' R.*, 171). This is a very early case, and the doctrine of it has not always been adopted by the courts, for it seems by the later authorities that in some cases a subject may have a right to the soil of the sea when covered with water. It was said by Erle, Ch. J., in a late case decided by the English Common Bench, that the soil of the sea-shore to the extent of three miles from the beach is vested in the crown, and that there is no rule of law which prevents the crown from granting to a subject that which is vested in itself (*The Free Fishers of Whitstable v. Gann*, 11 *Com. Bench R.*, *N. S.*, 387; *vide Same v. Foreman*, 2 *Law R.*, *C. P.*, 688; *S. C.*, 3 *ib.*, 578). And according to Lord Hale, as understood by Mr. Angell, "those parts of the sea which may require a naval armament to protect them do not lie within the extent of private acquisition or possession" (*Vide Angell on Tide-waters*, 286; *Hale de Jure Maris*, 32).

As the sea-shore may be part of a manor, so it may be parcel of a vill or parish, and evidence for that will be the usual perambulations, common reputation, known metes and bounds, and the like (*Hale de Jure Maris*, 27). But it is held by the court that, *prima facie*, the sea-shore is extra-parochial (*Regina v. Musson*, 8 *Ellis & Blackburn's R.*, 900; *S. C.*, 4 *Jur.*, *N. S.*, 111; and *vide Rex v. Gee*, 1 *Ellis & Ellis' R.*, 1068).

It may, then, be affirmed that it is a settled principle in the laws of this country and of England that the right of soil of owners of land bounded by the sea, ~~et~~ which is the same, on navigable rivers

where the tide ebbs and flows, extends only to high-water mark, and that the shore below common, but not extraordinary high-water mark, belongs to the State as trustee for the public. In England the crown and in this country the people have the absolute proprietary interest in the shore of these waters, though it may by grant or prescription become private property (3 *Kent's Com.*, 7th ed., 514, 515). But the grantee of such shore will not take a fixed freehold, but one that shifts as the shore recedes or advances (*Scrutton v. Brown*, 4 *Barn. & Cres. R.*, 485). So that in all cases where the land of a private individual is bounded upon the sea, *prima facie*, the boundary is the shore at ordinary high-water mark.

CHAPTER III.

THE RIGHTS OF PROPERTY ON NAVIGABLE RIVERS WHERE THE TIDE EBBS AND FLOWS — THE LAW OF BOUNDARY WITH REFERENCE TO THESE RIGHTS — THE RULES APPLICABLE TO THE BOUNDARY OF PRIVATE PROPERTY BORDERING ON NAVIGABLE RIVERS.

THE same principle which governs the question of boundary of property adjoining the sea, applies to arms of the sea, estuaries and navigable rivers below tide-water. And, therefore, it has been recently decided by the English Court of Queen's Bench, that where a navigable river divides two parishes, the boundary of each parish is presumed, until the contrary be shown, to coincide with the line of the medium high tide on each bank. The bed of the river was consequently declared to be extra-parochial (*Trustees of the Duke of Bridgewater v. Booth*, 7 *Best & Smith's R.*, 348; *S. C.*, 2 *Law R.*, *Q. B.*, 4). This, however, is merely a *prima facie* presumption, and it seems that evidence may be produced to show that the bed of the river belongs to both or perhaps wholly to one of the adjoining parishes. In a recent case in the English Court of Queen's Bench, it appeared that the pier at Rotherhithe rested on wooden piles fixed in the bed of the river between high and low-water mark; that, in beating the bounds of the parish of Rotherhithe the authorities were accustomed to proceed along the embankments, wharves or other shores of the river Thames; while in the adjoining parish of Bermondsey the

authorities went along the middle of the river. The parish of Rotherhithe had never done or exercised any parochial acts or authority beyond the embankments. The question of the liability of the pier to be rated to the relief of the poor having come before the court on a special case stated for their opinions, Lord Campbell said: "At *nisi prius* I should direct a jury to presume from the circumstances of this case that the land on which the pier is built was within the parish of Rotherhithe. Where the beaters of the boundaries go as near the extremities of the parish as the nature of the land will admit of, what more is necessary? They assume that it is well known that the parish extends to the middle of the river, and so the authorities of Rotherhithe (though other parishes act differently) content themselves with keeping along the dry land, and the acts of the Bermondsey authorities are rather against those in favor of the exemption claimed by the defendants, as showing that other neighboring parishes on the Thames extend to the middle of the river" (*McCannon v. Sinclair*, 2 *Ellis & Ellis' R.*, 53; *S. C.*, 5 *Jur.*, *N. S.*, 1,022; *S. C.*, 28 *Law J.*, *M. C.*, 247).

The rule that the land of an individual bounded upon a navigable river, below tide-water, extends only to common high-water mark, is not *absolute*, but it may be shown by competent evidence that the individual is the owner of the *shore* extending down to low-water mark. This doctrine, however, is not confined to boundaries upon navigable rivers, for the ordinary rule may be varied by evidence in cases of boundaries upon the sea itself, as well; for example, it has been held by the Supreme Judicial Court of Massachusetts, that by a usage in that State (founded on a colony ordinance of 1641, ancient charter, 148) which has the force of common law, the owner of lands bounded on the sea or salt water shall hold to low-water mark, so that he does not hold more than 100 rods below high-water mark, and saving the rights of others to convenient ways (*Stone v. Freeman*, 6 *Mass. R.*, 435; *Austin v. Carter*, 1 *ib.*, 231; *Commonwealth v. Charlestown*, 1 *Pick. R.*, 180; *Barker v. Bates*, 13 *ib.*, 255). It has been held, however, that this rule does not extend to a grant of a piece of land entirely covered at high-water (*Sufkin v. Haskell*, 3 *Pick. R.*, 356). And where land is granted as bounded on a way, which way adjoins the sea-shore, it has been held that the usage does not apply (*Codman v. Winslow*, 10 *Mass. R.*, 146). But a proprie-

tary grant, in 1680, of "a piece of land below high-water mark, to set a shop upon, not exceeding forty feet in width," was construed to extend to low-water mark (*Adams v. Frothingham*, 3 *Mass. R.*, 350). It may be added in this connection, that the ebb of the tide, where from natural causes it ebbs the lowest, and not the average or common ebb, is to be taken as the low-water mark (*Sparhawk v. Bullard*, 1 *Met. R.*, 95).

At an early day the Supreme Court of Connecticut laid down the rule, in unqualified terms, that the proprietor of land adjoining to a navigable river has the exclusive right to the soil, between high and low-water marks, for the purpose of erecting wharves and stores thereon. This was declared in giving construction to a grant, involving the shores of Dragon river at a point where the tide ebbs and flows, and the question evidently turned upon the language of the grant; and the court did not design to hold that the common-law doctrine that, *prima facie*, the title to all parts, the arms of the sea and navigable rivers, to high-water mark, is in the sovereign of the State; for the rule was expressly recognized by the chief justice, in delivering the opinion of the court (and it was, therefore, argued as an undoubted consequence), that the State "may grant the property of the soil between high and low-water mark to a subject or corporation" (*East Haven v. Hemingway*, 7 *Conn. R.*, 186, 198); and three years later, the same court declared the common-law rule upon the subject to be applicable in that State. Daggett, J., who delivered the opinion of the court, said: "The doctrine of the common law is that the right to the soil of the proprietors of land on navigable rivers extends only to high-water mark; all below is *publici juris*, in the king, in England. That is the law in Connecticut; for we have no statute abrogating it. It was the law brought by our ancestors; it is our law; the soil being not indeed owned by the king, but by the State" (*Chapman v. Kimball*, 9 *Conn. R.*, 38, 40). So far as the question of *boundary* is concerned, therefore, the common law is in force in Connecticut; but the rights of the proprietor of lands to the *shores* of the sea or a navigable river have been somewhat extended in that State; for it was laid down in the case of *Chapman v. Kimball*, that the adjoining proprietors have the right to the shore, subject to the paramount right of the public. The judge said: "The usage of the owners of land to high-water mark to wharf out against their

own land has never been disputed. The interests of navigation have been subserved, and the consequences have been altogether salutary. On the death of the owner to high-water mark, his estate in the shore and the erections upon it has descended to his heirs. This is our common law, founded on immemorial usage (*East Haven v. Hemingway et al.*, 7 Conn. R., 186, and the cases there cited; *Chapman v. Kimball*, 9 Conn. R., 41, 42); and Judge Swift, long before that time, said, in his System: 'All adjoining proprietors, on navigable rivers and the ocean, have a right to the soil covered with water as far as they can occupy it; that is, to the channel, and have the exclusive privilege of wharfing and erecting on the front of their land' (1 *Swift's System*, 341). But in his Digest, written nearly thirty years after, he states the law to be that 'the ocean, navigable arms of the sea and navigable rivers, as far as high-water mark, belong to the public; and the proprietors of the adjoining land own to high-water mark' (1 *Swift's Dig.*, 109).

A river may be navigable below the ebb and flow of the tide, in the sense of the common law, and, in *fact*, navigable *above* the ebb and flow of the tide; but not so in accordance with the rules of the common law. So that the question of boundary, in respect to lands adjoining such river, would have to be determined by one principle above, and another below, tide-water. Even the Mississippi river, navigable for a large class of vessels for thousands of miles above tide-water, according to some decisions, is not regarded in law navigable. So that a grant of land, lying upon that river, by the United States, without reservation, passes to the grantee a title to the middle thread of the current, the same as in the case of grants bounded upon the smaller rivers of the country (*Vide Middleton v. Pritchard*, 3 *Scam. R.*, 510).

The common-law criterion of a navigable stream is the flow and reflow of the tide; the civil-law criterion is the capability and suitableness of the stream to the purposes of navigation, in the ordinary state of the water. In the State of Tennessee the civil-law criterion has been adopted. But in all other respects the principles of the common law, regulating and defining the rights of the public and the riparian owners, remain unchanged. And it has been declared by the Supreme Court of the State that a river may be navigable, in the ordinary acceptation of the term, and yet not navigable in a legal, or common-law sense; and such

is a river or stream of sufficient depth, naturally, for valuable floatage, such as rafts, flat-boats, and small vessels of lighter draft than ordinary. It was further declared that, if a river or water course be navigable in a legal sense, the soil covered by the water, as well as the use of the stream, belongs to the public. If it be navigable only in the ordinary sense, the ownership of the bed of the stream is in the riparian proprietors, and the public have an easement therein for the purposes of transportation and commercial intercourse. If the stream be so shallow as to be unfit for such purposes of transportation and commerce, the right both of property and use is wholly and absolutely in the owners of the adjoining land (*Stuart v. Clark*, 2 *Swan's R.*, 9).

By the civil law a public river is defined as one which is perennial, or ever flowing, and which is also capable of navigation. The use of the bed of such a river is in the public; but the soil itself belongs to the owners of the banks on each side. By the civil law the public have a right of towing and mooring boats, and of loading and unloading their goods on the banks of a public river (*Digest*, lib. 43, tit. 12; *Inst.*, lib. II, tit. 1, 4; *vide Sanders' Institutes*, lib. 2, tit. 1, 22). No such rights as these, however, are recognized at common law, except by well established usage; and then they are held to exist (*Ball v. Herbert*, 3 *Term R.*, 253; *Badger v. S. Y. R. Co.*, 1 *Ellis & E. R.*, 347; *Monmouth Canal Co. v. Hill*, 4 *Hurlstone & Norman's R.*, 427; *Hollis v. Goldfinch*, 1 *Barn. & Cres. R.*, 205).

It has been held by the Supreme Court of Indiana that there are two classes of streams within and bordering on that State, which are called navigable streams and public highways. One class is only navigable for certain kinds of craft, and is not visited by vessels from the navigable waters of other States, but the other is navigable for such vessels. The State has exclusive jurisdiction over the first class, and may authorize the streams of which it is composed to be obstructed for the public good, and no action can be sustained therefor except private property be taken or injured. Over the streams of the second class, in the absence of congressional interference, the State has a like jurisdiction, so far as those streams are within her territorial limits; but the national legislature may interfere and deprive the State of this jurisdiction. A State cannot seriously obstruct the navigation of those streams, which are channels of inter-State trade, as congress has interfered to regulate com

merce upon them (*Depew v. The Board of Trustees, etc.*, 5 *Indiana R.*, 8). These are important distinctions; but as there are no common-law navigable rivers in the State of Indiana, the question of *boundary* is determined by one rule in respect to all lands adjoining the rivers of such State, and that is the one applicable to non-navigable rivers by the common law.

In the State of New York three classes of rivers in and bordering upon the State are recognized by the courts; those which are navigable at common law or below tide-water, those which are not navigable at common law but are nevertheless navigable *in fact* and are declared to be public highways, and those which are in no sense navigable or public highways. The people in their sovereign corporate capacity own the beds of all navigable waters within the State. They are held for the common benefit, and to promote the convenience and enjoyment of all the citizens, but not in the manner the capitol and public buildings are owned. The State may authorize the erection of wharves upon the shores of those waters by private individuals, but it can only do so to promote the common benefit and enjoyment (*Smith v. Levinus*, 8 *N. Y. R.*, 472). The boundary of lands owned by private individuals bordering on these waters is the line of high-water mark. The State exercises certain rights and functions over the rivers of the State which are not navigable, but are declared nevertheless highways; but the question of boundary in respect to these and those which are in no sense public is precisely the same. The rule in those cases will be frequently referred to.

In the State of North Carolina it is held that the ebb and flow of the tide is no rule for determining whether a river is navigable or not, and the ordinary rules for fixing the boundary of private lands adjoining what is called navigable rivers in that State are not fully recognized by their courts. It has been accordingly declared by the Supreme Court of the State that a stream eight feet deep and sixty yards wide, with an unobstructed navigation for sea vessels to the ocean, is a navigable stream, and its edge at low-water mark is the boundary of the adjacent land (*Wilson v. Forbes*, 2 *Dev. R.*, 30; *Ingram v. Threadgill*, 3 *ib.*, 59), while in the State of Alabama it is held that the "navigable waters" within the State have been dedicated to the use of the citizens of the United States, so that it is not competent for congress to grant a right of property in the same to individuals; and further, that

the "navigable waters" embrace all the soil within high-water mark (*The Mayor v. Eslava*, 9 *Porter's R.*, 577).

To state the rule in a few words, it may be affirmed that by the common law, which is generally in force in this country, the *alveus* or bed of all navigable rivers as far as the tide ebbs and flows is vested in the State, subject to the public rights of navigation and fishing. In determining the line of demarkation between the property of the State in the soil of a navigable river and the property of the riparian owners on each side of the stream the same rule is to be applied as in case of property bounding on the sea-shore; consequently the property of the State will not extend beyond the line of the medium high tides throughout the year, so that lands of a private individual bounded upon a navigable river below tide-water extend to ordinary high-water mark, and high-water mark is *prima facie* the boundary line. All below high-water mark belongs to the State (*State v. Jersey City*, 1 *Dutcher's R.*, 525). This is the ordinary or general rule, which may be waived or varied by usage or other evidence in certain cases.

The common law, governing the right of property in rivers and streams, has long been settled. The law of maritime and fluvial property and rights, as laid down by the great authority in the law, Lord Chief Justice Hale, in his tract, *De Jure Maris*, has been uniformly and repeatedly recognized and followed in the courts of Westminster Hall; and very often the same rules have been adopted by the courts of this country.

The question as to what should be regarded a navigable river in this country has been very recently considered by the Supreme Court of the United States, although the case before the court involved simply the construction of an act of Congress in which the term is used. The court expressly declared, however, that the doctrine of the common law, as to the navigability of waters, has no application in this country. Here, it was said, the ebb and flow of the tide do not constitute, as in England, any test at all of the navigability of waters. The test by which to determine the navigability of our rivers is found in their navigable capacity. Those rivers are public navigable rivers, in law, which are navigable in fact. Rivers are navigable in fact when they are used, or are susceptible of being used in their ordinary condition as highways for commerce, over which trade and travel are or may

be conducted in the customary modes of trade and travel on water; and it was further declared that they constitute navigable waters of the United States, within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form, in their ordinary condition by themselves, or by uniting with other waters, a continued highway, over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water. It was accordingly held that Grand river, in Michigan, is a navigable water of the United States from its mouth, in Lake Michigan, to Grand Rapids, a distance of forty miles; being a stream capable of bearing for that distance a steamer of one hundred and twenty-three tons burden, laden with merchandise and passengers, and forming, by its junction with the lake, a continued highway for commerce, both with other States and with foreign countries (*The Daniel Ball*, 10 Wall. R., 557). This does not necessarily settle the rule of *boundary* in respect to such rivers; but the case has an important bearing upon that subject.

Of common-law right, the property of the soil, and of all aquatic privileges for fisheries, etc., in the shores and arms of the sea, and in navigable rivers in which the tide flows, is in the sovereign; while all the uses and enjoyment are public and common. The presumption of the law is always that this original right continues, unless the contrary is shown by express proof of private right by grant or prescription. It is clear, upon any view of the law, that the original or the presumptive right of the people to the property of the navigable rivers and their beds does not prevent actual appropriation of proprietary interests in them to private citizens by grants. Therefore, a subject may have a right in creeks or arms of the sea by charter or grant; and the sovereign power may, also, "grant that very interest itself, viz., a *navigable* river; that is, an arm of the sea, *the water and soil* thereof." The *statutes* of some of the States adopt the same principle; for example, the statute of New York, which authorizes the commissioners of the land office to make, in their discretion, grants of land under water in all the navigable rivers in the State, and in the bay and harbor of New York (1 R. S., 208; 1 *Statutes at Large*, 208). It may be added that rivers, where the tide ebbs and flows, probably do not belong to the public, only in those parts which are *navigable*. So that the owners of lands adjoining a river below the ebb and flow of

the tide, if *navigable*, are bounded, *prima facie*, by the line of high-water mark; but if not in fact *navigable*, then they may be presumed to own to the center of the stream.

In respect to the title to the bed of the stream, the Supreme Court of New Jersey has recently decided that the State is the absolute owner of all navigable waters within the territorial limits of the State, and of the soil under such waters; and that the legislature may, therefore, lawfully grant any portion of such soil, lying below high-water mark, to any person without making compensation to the adjacent riparian proprietors. The court further decided that a statute, giving to a railroad company the right to construct their road along a navigable stream, and to acquire the rights of the shore owners, does not confer upon such company the right to take the lands of the State lying below high-water mark. And the general doctrine was declared that the owner of lands, lying along the bank of a navigable stream, may, by the local custom of New Jersey, acquire title to the land in front of him by reclaiming and improving the same. But that the title to such land does not rest in the riparian proprietor until the land is actually reclaimed; and, as the custom rests in mere license, revocable at the pleasure of the legislature, the latter may grant such land to a stranger at any time before the same is reclaimed and annexed to the upland (*Stevens v. Paterson, etc., Railroad Company*, 34 *N. J. Law R.*, 532). This seems to be in accordance with the doctrine laid down by Lord Hale, where he says: "There be some streams or rivers that are private, not only in propriety or ownership, but also in use; as little streams, and rivers that are not a common passage for the king's people. Again, there be other rivers, as well fresh as salt, that are of common or public use for carriage of boats and lighters; and these, whether they are fresh or salt, whether they flow and reflow or not, are, *prima facie publici juris*, common highways for man or goods, or both, from one inland town to another. Thus, the rivers of *Wey*, of *Severn*, of *Thames*, and divers others, as well above the bridges and ports as below, as well above the flowings of the sea as below, and as well where they have come to be of private propriety as in what part they are of the king's propriety, are public rivers *juris publici*" (*De Jure Maris. Pars Prima, ch. 3*).

CHAPTER IV.

THE RIGHTS OF PROPERTY ON UNNAVIGABLE RIVERS WHERE THE TIDE DOES NOT EBB AND FLOW—THE RULES OF LAW APPLICABLE TO THE BOUNDARY OF PRIVATE PROPERTY BORDERING ON THESE STREAMS—THE COMMON-LAW DOCTRINE AS TO WHAT ARE UNNAVIGABLE RIVERS, AND WHERE THE SAME IS RECOGNIZED—LAW OF BOUNDARY IN RESPECT TO ARTIFICIAL WATER-COURSES.

THE rule in respect to the boundary of property adjoining rivers which are not navigable by the common law, or rivers above tide-water, is different from that which prevails in respect to rivers below the ebb and flow of the tide. At common law a riparian proprietor, bounded by a stream above the ebb and flow of the tide, though navigable in part, owns the land to the center or thread of the stream, and the public have the right to use the stream for the purposes of navigation; but in other respects the right of the proprietor to the soil is perfect. In other words, opposite riparian proprietors, on a stream in which the tide does not ebb and flow, own respectively to the center of the stream; but neither can, by constructing docks or making excavations on his side, abridge the exercise of the rights of the opposite owner (*Walker v. Shepardson*, 4 *Wis. R.*, 486); that is to say, where a private or a tideless river separates the lands of two riparian owners, the line of demarkation between the two estates is presumed, *prima facie*, to coincide with the *medium filum* of the stream (*Wright v. Howard*, 1 *Simons & Stuart's R.*, 203; *Schultes on Aquatic Rights*, 136).

It was observed by Lord Cranworth, in a leading case in England, that "the soil of the *alveus* is not the common property of the two proprietors, but the share of each belongs to him in severalty; so that if, from any cause, the course of the stream should be permanently diverted, the proprietors on either side of the old channel would have a right to use the soil of the *alveus*, each of them, up to what was the *medium filum aquæ*, in the same way as they were entitled to the adjoining land" (*Bichett v. Morris*, 1 *Law R., Sc. App.*, 58). And the Supreme Judicial Court of Massachusetts has recently held that if the course of a river, not navigable, changes and cuts off a point of land on one side, making an island, such island still belongs to the original owner. In such

case, if the old bed of the river (being gradually diverted by the current) fills up, and new land is formed, such newly-formed land belongs to the opposite riparian proprietors, respectively, to the thread of the old river; and if new land be formed in the river above such island, independent of the island, and not by a slow, gradual and insensible accretion to it, such new land above belongs to the opposite riparian proprietors, respectively, to the *flum aquæ*, or thread of the river. The thread of the river, in such case, would be the medium line between the shores or natural water-line on each side at the time the new land was formed, without regard to the channel or deepest part of the stream (*Trustees of Hopkins Academy v. Dickinson*, 9 *Cushing's R.*, 544).

Chancellor Kent lays down the rule that grants of land, bounded on rivers, or upon the margins of the same, or along the same, above tide-water, carry the exclusive right and title of the grantee to the center of the stream, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river; and the public, in cases where the river is navigable for boats and rafts, have an easement therein or a right of passage, subject to the *jus publicum*, as a public highway (3 *Kent's Com.*, 7th ed., 515, 516). This is the common-law doctrine, and is recognized in most of the States. It has been held, even in the case of the Mississippi river, that the common law, and not the civil law, governs, and the magnitude of the river does not affect it. It was declared that the Mississippi river, above the ebb and flow of the tide, is not navigable in the sense of the common law, and the rights of the riparian owner go to the middle of the river; that the act of Congress, establishing the Mississippi river as the western boundary of the Mississippi territory, and adopting the common law for the government of that territory, fixed the middle of the river as the boundary line; and that the rights of riparian proprietors on the east shore of the Mississippi, therefore, must be determined by the common law. Nor are their rights as to the soil therein, or to the use of the bank of the river, affected by the act of Congress making that river "a common highway, free to every citizen, without tax or duty;" so decided in the same case (*Morgan v. Reading*, 3 *Smedes & Marsh. R.*, 366).

The question has been much discussed as to whether the rule of the *common law* prevails in this country, that grants of lands, bounded on rivers and streams *above tide-water*, extend *usque*

filum aquæ; but, as before intimated, it has been decided in most of the States that such is the law here. A well considered case came before the old Supreme Court of the State of New York, involving the right to the soil under the waters of the Mohawk river, near where it falls into the Hudson. The court held that the soil under the river belongs to the owners of the adjoining banks; and the case was then taken to the Court of Errors on writ of error, where the whole question was ably discussed by counsel, and elaborately considered by different members of the court; but the decision was based upon the construction of the grant under which the claimant held the adjoining bank, and the question was thus left open as to whether the common-law rules of property, as to the fresh-water rivers of the State, are applicable here or not. Tracy and Beardsley, senators, argued with great ability that the great fresh-water streams of this country are not subject to the principle of individual appropriation, as applied by the common law of England; while the late chancellor of the State maintained that the doctrine of the common law, vesting the sovereign with the ownership as well as the jurisdiction of tide-water streams, making other large rivers public only as to their uses, but private as to all proprietary interests, and regarding the ebb and flow of the tide as the criterion of original or prescriptive rights of property, was, at the period of our separation from the British crown (as it still is), the undisputed law of England, is the recognized doctrine of this country; and that the common law of England, since the occupation of the country by the English, has been the law of the land (*The Canal Appraisers v. The People*, 17 Wend. R., 571, 574, 590).

At a later date, however, the question was squarely presented to the late Court of Errors of the State of New York, and it was decided that fresh-water rivers, to the middle of the stream, belong to the owners of the adjacent banks. But if they are navigable, the right of the owners is subject to the *servitude of the public interest* for passage or navigation. Verplanck, senator, said: "If this is (as I think it is) still an open question, I must then hold that the ancient rule of proprietary interest in rivers and streams, when undisturbed by positive grant or prescription, and the flow of the tide as the criterion of that interest, either in the people or in individuals, whatever objection there may be to the policy of the rule, having been part of the common law at the

erection of the State into an independent sovereignty, was adopted with the rest and remains the law till repealed.

“If it be argued, as was eloquently and ably done, that the reason of the rule does not apply to the rivers of this State, and that the rule is not only arbitrary but impolitic, I must reply, that we have no proof whatever that this rule of the common law was ever abrogated or rejected by our colonial legislature or judiciary—that by our successive State Constitutions we adopted so much of the common law of England as formed the law of the colony in 1775 (*N. Y. Constitution of 1777, art. 35; Amended Const., art. 8, § 13*) as ‘the law of the State, subject to such alterations and provisions as the *legislature* shall, from time to time, make concerning the same.’ We then took that body of laws as a whole, and as being in the main suited to our wants and habits, though probably requiring legislative alteration as to many of its rules and doctrines unsuited to our government and condition. These were left to be amended by legislative enactment and not by judicial repeal. * * * I am therefore of opinion that, by the common law still remaining the unrepealed law of this State, the legal title to the portion of the Genesee river where the waters were temporarily diverted by the construction of the aqueduct was in the proprietors of the adjacent banks, subject only to the uses of navigation so far as those waters were capable of it, and to the rights of other proprietors, above or below, to the use of the stream” (*The Commissioners of the Canal Fund v. Kempshall*, 26 *Wend. R.*, 404, 417, 418).

So it is very evident that the question depends essentially as to whether the common law of England upon the subject is recognized as the law of the State or not. If it is, then the rule is as has been stated; if it is not, the rule may be different. Streams of water have been divided into several distinct classes: 1. Arms of the sea, in which the tide ebbs and flows. These belong to the public. 2. Streams which are navigable for vessels, boats, lighters, and, as it has also been held, for rafts. In these the people have the right of eminent domain for the purposes of navigation and commerce; and the riparian owner has only a qualified right to the bed of the stream, and the water which flows over it, subordinate to the superior rights of the public. To this class may, perhaps, be added such streams as have been declared by statute to be public highways. 3. Streams which are so small,

shallow or rapid, as “*not to afford a passage for the king’s people*,” as Lord Hale expresses it ; such streams as are not navigable for boats or vessels or rafts. These are altogether private property. The Hudson river has been said to furnish an example of each of these classes of streams, in different parts of its course. That part of its course in which the tide ebbs and flows belongs exclusively to the public. Another portion is navigable for vessels and boats ; and in that the riparian owner holds a qualified property subject to the public use. Another portion higher up is not navigable at all, and *that* is private property. *Prima facie*, all above the ebb and flow of the tide, the adjoining proprietors own the soil under the waters of the river, although the rule may be changed by evidence, as has been before shown. This is the doctrine adopted by the courts of most of the American States. In such cases the courts uniformly consider the term “navigable” as technical when applied to rivers, and that fresh-water rivers above the flow of tide are not navigable within the meaning of the common law. Hence they assert and carry out the principle, that where lands are owned by the same individual on each side of a fresh-water river, he owns the bed of the river, and if bounded on one side of the river he owns to the center. This is certainly the doctrine in regard to individuals as between each other, and the highest courts of several of the States have held that the same doctrine applies in all cases where the State is a party, except in those instances where the State, in granting lands on navigable fresh-water rivers, or even those not navigable, may have studiously avoided granting the river itself or the bed of the river, anticipating that the same might be wanted for public purposes. The States, however, are by no means unanimous in respect to the rule. For example, the courts of Pennsylvania have long since declared and held, that the great rivers of that State are not subject to the common-law rule, that owners on the banks have the right of soil and the right of fishing to the middle of the stream. In other words, it is held that the common-law doctrine, that fresh-water rivers belong to the owners of the banks, is not applied to the Susquehanna and other large rivers of Pennsylvania. Such rivers are declared to belong to the State, and no exclusive rights of fishing have been granted by the State to the owners along their banks (*Curson v. Blazee*, 2 *Binney’s R.*, 475 ; *Shrunk v. Schuylkill Company*, 14 *Serg. & Rawle’s R.*, 71). And

it has been especially declared that all below high-water mark, in the channel of the Susquehanna, is a public highway, and that the State may improve it by damming or otherwise; and if a spring below high-water mark is covered by such improvements, the owner is not entitled to damages (*Commonwealth v. Fisher*, 1 *Penn. R.*, 462).

It has been quite recently held by the Supreme Court of the State of Pennsylvania that all rivers and streams of water that are subject to tides, or capable of being navigated in the common sense of the term, in such State are treated as navigable; and that grants of the adjoining soil are not *usque ad filum medium aque*, but only to low-water mark, the soil and water formed between the lines that describe low water being retained as eminent domain for the use of all citizens, and that the right of navigation in all such navigable waters is the paramount public right of every citizen (*Flanagan v. Philadelphia*, 42 *Penn. R.*, 219). And in a more recent case, the same court held that the Monongahela river at Pittsburgh is, by the settled law of Pennsylvania, navigable; and that the soil in the bed of the river up to low-water mark, and the river itself, are as much the property of the State, as in England a tide-water river is the property of the crown (*Monongahela Bridge Company v. Kirk*, 46 *Penn. R.*, 112). In some of the Pennsylvania cases the doctrine underwent a very elaborate discussion, and it was declared that the great rivers of America are so different from those of England, that the same definition of a navigable river cannot properly be applied to both, and the courts seem to be unanimous in the opinion that the English distinction, that the character of navigability depended upon the quality of the water, fresh or salt, is wholly inapplicable to the principal rivers of that State; that the only test was, whether the river was or not actually navigable (*Vide also Bird v. Smith*, 8 *Watts' R.*, 434; *Union Canal Company v. Landis*, 9 *ib.*, 228).

So, also, in the State of Alabama the courts hold that every water-course in the State, which is suitable for the ordinary purposes of navigation, whether above or below tide-water, is a public highway; and that the owners of land bounded thereon have no right of soil to the bed of the stream below low-water mark (*Bullock v. Wilson*, 2 *Porter's R.*, 436). But the courts hold that the *onus* is on the party, claiming it to be so, to prove that a stream above tide-water is navigable, and, therefore, open to the public.

And, upon this point, the questions declared to be are whether it is fit for valuable floatage; whether the public generally are interested in transportation on it; whether its capacity for floating continues long enough to make it beneficially useful to the public, and to important public interests; whether it has been generally used for important floatage; how it has been treated by government surveys; whether it will be valuable for future public use; and that whether a stream is navigable is a question of law, after the facts as to these points are ascertained (*Rhodes v. Otis*, 33 Ala. R., 578). On these principles the Supreme Court of the State has held that Murder creek, near Fort Crawford, in Conecuh county in that State, is not a navigable stream; it appearing that such creek is not affected by the ebb and flow of the tide, has never been declared a public highway by legislative authority, and was not treated as a navigable stream by the United States engineers; although it appeared in evidence that within the last twenty years keel boats, loaded with cotton, had been several times floated down it during the winter season (*Ellis v. Carey*, 30 Ala. R., 725). It may be also interesting to note that the same court has held that the bank of a river is that space of rising ground above low-water mark which is usually covered by high water, and the term, when used to designate a precise line, is vague and indefinite (*Howard v. Ingersoll*, 17 Ala. R., 780).

The Circuit Court of South Carolina, at an early day, held, after stating the rule of the common law, that in England no river is considered navigable except where the tide ebbs and flows, that that rule would not do in that State, where the rivers are navigable several hundred miles above the flowing of the tide. But it was declared, nevertheless, that the claims of the owners of land adjacent to a river extend to the center of the bed of the stream, subject to the use the public may make of the waters for the purposes of navigation (*Cutes v. Wadlington*, 1 McCord's R., 580). And the courts of the same State held, at a much later day, that a grant or conveyance of land bounded by a river, not technically navigable, extends to the *medium filum aquæ*, unless the terms used in the writing clearly denote the intention to stop short of that line (*McCullough v. Wall*, 4 Richardson's R., 68). It seems that Pond Branch, in the State of South Carolina, by an act of the legislature, passed in 1853, became a navigable stream (*Witt v. Jefcoat*, 10 Rich. Law R., 388).

In the State of North Carolina the Supreme Court has repeatedly held that the ebb and flow of the tide, according to the rule of the common law, is no rule for determining whether a river is navigable or not; but that waters which are sufficient in fact to afford a common passage for people in vessels are to be taken as "navigable;" and in one case one of the judges, in commenting upon the applicability of the common-law rule to the navigable waters of that State, pronounced it inapplicable; and remarked that, by the rule of the common law, Albemarle and Pimlico sounds, which are inland seas, would not be deemed "navigable" waters, and would be the subject of private property; but that, in fact, it made no difference whether there is or ever was any tide in Albemarle sound (*Vide Collins v. Benbury*, 3 *Iredell's R.*, 277; *Wilson v. Forbes*, 2 *Dev. R.*, 30; *Ingraham v. Threadgill*, 3 *ib.*, 59).

The Supreme Court of Tennessee holds that the owner of land on a navigable stream in that State, above tide-water, has the title to ordinary low-water mark, and not to the center of the stream. Judge Turley, in delivering the opinion of the court in one case, said: "All laws are, or ought to be, an adaptation of principles of action to the state and condition of a country, and to its moral and social position. There are many rules of action recognized in England as suitable which it would be folly in the extreme, in countries differently located, to recognize as law; and, in our opinion, this distinction between rivers 'navigable' and 'not navigable,' causing it to depend upon the ebbing and flowing of the tide, is one of them. The insular position of Great Britain, the short curves of her rivers, and the well-known fact that there are none of them navigable above tide-water but for very small craft, well warrants the distinction there drawn by the common law. But very different is the situation of the continental powers of Europe in this particular. Their streams are, many of them, large and long, and navigable to a great extent above tide-water; and, accordingly, we find that the civil law, which regulates and governs those countries, has adopted a very different rule" (*Elder v. Burns*, 6 *Humph. R.*, 358, 366; *Stuart v. Clark*, 2 *Swan's R.*, 9).

The courts of the State of Mississippi, at an early day, in the case before referred to declared that the common law, and not the civil law, governs in the case of the rivers of that State, and that the mag

nitude of the river does not affect the question ; that the Mississippi river, above the ebb and flow of the tide, is not navigable in the sense of the common law, and the right of the riparian owner goes to the middle of the river, subject, of course, to a right of passage in the public (*Morgan v. Reading, 3 Smedes & Marsh. R.*, 336). But at a much later date, the High Court of Errors and Appeals, of the same State, limited the doctrine to the cases of private individuals, and declared that it was not easy to understand how a man can be said to have a property in water, light or air, of so fixed and positive a character as to deprive the sovereign power of the right to control it for the public good and the general convenience. It was said that such a right exists as to individuals, and it cannot be interfered with by them. But that the State, by virtue of her right of eminent domain, has the paramount right to control and dispose of everything, within her limits, which is not absolute and exclusive private property, to the promotion of the public good, and even to take private property for the same purpose, on rendering just compensation ; and it was expressly declared that the doctrine that the rule of the common law is not applicable to our large public rivers used for navigation, — that the rights of the owners of the lands bounded by such streams are subordinate to the right and power of the State to use and appropriate them to the public good in promotion of navigation, and that such rivers, whether tide-waters or not, are, as to the jurisdiction and power of the State, to be considered as navigable rivers, — is supported by sound reason, and should be established as the law of the land. It was said that whilst the right of property exists in the individual, in relation to the streams of water exclusively his own, such as springs or small water-courses in the interior of his lands, and bounded by them on both sides, and whilst it may exist in reference to public rivers, as against the interference of private individuals, it cannot be admitted to prevail as to public rivers and highways used for navigation, against the paramount jurisdiction of the State (*Commissioners of Homochitto River v. Withers, 29 Miss. R.*, 21).

A case came before the Supreme Court of Iowa, at an early day in the history of the State, in which the whole subject under consideration was learnedly discussed and the authorities reviewed. Judge Woodward, who delivered the opinion of the court, stated three propositions which he deemed to be established : First

Although the ebb and flow of the tide was, at common law, the most usual test of navigability, yet it was not necessarily the only one. Second. However the truth may be upon the above proposition, the test is not applicable to the Mississippi river. Third. The common consequences of navigability attach to the legal navigability of the Mississippi. After examining the authorities upon the first point, the judge says: "However the truth may be upon the first proposition, the flow and reflow of the tide is not applicable to the Mississippi as a test of its navigability. And, third, the common-law consequences of navigability attach to the legal navigability of the Mississippi river. The arguments and authorities upon these two propositions being in a great measure identical, they must be considered together. The thought has been before suggested, that, as a real and virtual test, the tide is a merely arbitrary one, and is not supported by reason; since many waters where the tide flows are not in fact navigable, and many where it does not flow are so. It is navigability in fact which forms the foundation of navigability in law; and from the fact follows the appropriation to public use, and hence its publicity and legal navigability. It is true that this legality attaches to some waters which do not possess the requisite quality in fact; but this arises from their relation to the high seas and to admiralty, and from the difficulty of making our bounded exceptions. It is impossible to bring the mind to an approval, when we attempt to apply it to the rivers of this country, stretching up to 3,000 miles in extent, flowing through or between numerous independent States, and bearing a commerce which competes with that of the oceans—a test which might be applicable to an island not so large as some of our States, and to streams whose utmost length was less than 300 miles, and whose outlet and fountain, at the same time, could be within the same State jurisdiction. In England, or in Great Britain, the chief rivers are the Severn, Thames, Kent, Humber, and Mersey; the latter of which is about fifty, and the first about 300 miles in length, and of this (the Severn) about 100 miles consists of the British channel. The world-renowned Thames has the diminutive proportions of 200 miles; and of even these lengths not the whole is navigable. Thus it will be seen that the chief rivers of good old England range in extent with our Connecticut, Merrimac, Hudson, Allegany, Monongahela, Cedar, Iowa and Des Moines, and bear a proportion of one to twenty

when compared with the greater rivers of this continent." And the court held that a riparian owner has not such property in or possession of a sand-bar below high-water mark in the Mississippi river, though within the *medium filum aquæ*, as will enable him to maintain trespass against one removing the sand; though he may have some rights in the premises, peculiar to himself and not common, for the violation of which an indictment or action on the case might lie, and it was declared that if the riparian owner does not own to the *medium filum aquæ*, he owns only to high-water mark, though doubtless with some qualified rights to low-water line (*McManus v. Carmichael*, 3 *Clarke's R.*, 1). And in a later case the same court held, that the proprietor of land upon the bank of, and adjacent to, the Mississippi river does not own to the middle of the main channel of the river, nor to low-water mark, but to high-water mark only; that is, he owns to the edge of the bank, and the whole bed of the river is in the public (*Haight v. Keokuk*, 4 *Iowa R.*, 199).

The doctrine of the common law is not fully recognized in the State of Ohio. The late Mr. Justice McLean, many years ago, carefully considered the doctrine in a case before him in the Circuit Court of the United States, wherein the controversy was in relation to the rights of the riparian owner upon the Ohio river. The learned justice said: "We apprehend that the common-law doctrine as to the navigableness of streams can have no application in this country, and that the fact of navigableness does in no respect depend upon the ebb and flow of the tide. Where a stream which is clearly not navigable forms the boundaries of proprietors on each side of it, under the common law each may claim to the middle of the stream. But this right cannot be exercised to the injury of other rights of the same nature. On navigable streams, the riparian rights cannot, we suppose, extend generally beyond high-water mark" (*Bowman's Devises v. Wathen*, 2 *McLean's R.*, 376). Of course, all of the rivers in or bordering upon the State of Ohio are far beyond the influence of tide, and yet the most of them are regarded as navigable. The Supreme Court of the State has declared that in Ohio the land between high and low-water mark, on navigable rivers, belongs to the riparian proprietors (*Blanchard v. Porter*, 11 *Ohio R.*, 138). And in a later case the same court held, that the legislature cannot, by declaring a river navigable which is not so in fact, deprive the riparian proprietors of their right to the

use of the water for hydraulic and other purposes without rendering them compensation. And further, that he who owns the land on both sides of a navigable river owns the entire river, subject only to the easement of navigation; and he who owns the land upon one bank only, owns to the middle of the main channel, subject to the same easement (*Walker v. The Board of Public Works*, 16 *Ohio R.*, 540; *vide also Gavit v. Chambers*, 3 *Ham. R.*, 495).

It has been declared by the Supreme Court of Michigan that the common-law rule, that those rivers only are subject to the servitude of the public interests which are of public or common use for carriage of boats and lighters, and for transportation of property, has been enlarged in this country, and, in nearly all the States, has been extended so as to be adapted to the necessities of trade and commerce, and to embrace rivers upon which, in their natural state, there is capacity for valuable floatage, irrespective of the fact of actual public use or the extent of such use. The fact that a floatable stream has not been used by the public, or has only been used by persons following a particular occupation, does not deprive such stream of its public character. Although, in some of the States, it was said, usage and custom have been regarded as the foundation of this public right in fresh waters, in the new States of the Union, from necessity and the nature of things, such cannot be the foundation of public right. The true test in determining the right of public use in fresh-water streams, as public highways, is whether a stream is inherently and in its nature capable of being used, for the purposes of commerce, for the floating of vessels, boats, rafts or logs. Where a stream possesses such a character, the court held, the easement exists, leaving to the owners of the bed all other modes of use not inconsistent with it (*Moore v. Sanborne*, 2 *Mich. R.*, 519). And in a later case the same court declared that although, in England, in the common-law sense of the term, those streams only are navigable in which the tide ebbs and flows, yet all rivers and streams above the ebb and flow of the tide, which are of sufficient capacity for useful navigation, are public rivers, and subject to the same general rights which the public exercise in highways by land, and which they possess in navigable waters. But it was held that the common-law principle, that the soil under such tideless public rivers, to the thread of the stream, is in the owner of the adjacent

bank, prevails in the State, and is applicable to the Detroit river (*Lorman v. Benson*, 8 *Mich. R.*, 18).

The Supreme Court of Minnesota has recently held that the act of Congress of May 18, 1796, providing that all navigable rivers, within the territory to be disposed of by that act, shall be deemed to be and remain public highways, is merely a declaration of the common law, and not a modification of it. And it was further held that the fact, that rivers are and must remain public highways, is not inconsistent with the view that riparian owners have the fee of the bed of the stream (*Schurmeier v. St. Paul, etc., Railroad Company*, 10 *Minn. R.*, 82).

In the State of Wisconsin it has been declared that a riparian proprietor, bounded by a stream above the ebb and flow of the tide, but navigable in part, owns the land to the centre or thread of the stream, and the public have the right to use the stream for the purposes of navigation; but in other respects the right of the proprietor to the soil is perfect (*Walker v. Shepardson*, 4 *Wis. R.*, 486). But in a later case the doctrine was qualified, to the extent of declaring that purchasers of land lying on the banks of a stream above the ebb and flow of the tide, when bounded by the stream, are *presumed* to run to the centre of the stream (*Mariner v. Schulte*, 13 *Wis. R.*, 692; and *vide Jones v. Pettibone*, 2 *ib.*, 308).

The subject under consideration has recently been before the Court of Appeals of the State of New York, where the whole doctrine applicable to navigable streams was elaborately and learnedly discussed by Davies, J., who argued that the common-law rules, determining what streams are navigable, are not applicable in this country; and it was held that the Mohawk river is a navigable stream, and that the title to the bed of the river is in the people of the State. After examining the decisions of and the discussions in the courts of England and the American States upon the topic at great length, the learned judge said: "We have now ascertained the doctrine of the common law, and that of the civil law, upon the subject now under consideration, and have traced the same to their respective sources. We have seen, in applying the principles of the common law to the waters of this continent, how great has been the embarrassment of courts and judges and text-writers; how variant has been the conclusions reached by them, and how contradictory and unsatisfactory have been the reasons for the results arrived at. * * * We have examined carefully the

judicial discussion of this doctrine, culminating in the decision by the court of ultimate appeal in this State, repudiating its applicability to the rivers of this State, and establishing the latter doctrine of the civil law" (*The People v. The Canal Appraisers*, 33 *N. Y. R.*, 461, 499, 500). The same doctrine had been before held by the present Supreme Court in a case involving the rights of parties to navigate the Canisteo river, in the county of Steuben. Johnson, J., who delivered the opinion of the court, said: "That this river was a public highway at common law, as it has always been understood and applied in this country, is abundantly established by the evidence in this case. Not only in this State, but in all our sister States, these great natural channels and avenues of commerce, whenever they are found of sufficient capacity to float the products of the mines, the forests or the tillage of the country through which they flow to market, have always been adjudged by our courts to be subject to the rights of passage, independent of legislation. The common law of England upon this subject, from its utter want of fitness and adaptation to the condition of things here, in our extended territory, with its numerous inland lakes and countless streams, capable of floating the products of the country hundreds and thousands of miles from the ebb and flow tide-water, has never been adopted; or, if adopted, it has been in a form modified and improved to fit the condition of the country and the wants of its inhabitants" (*Browne v. Seafield*, 8 *Barb. R.*, 239, 243, 244). This case was decided over twenty years ago, and the remarks of Judge Johnson are eminently sound and pertinent; and, from the high standing of the learned judge as a jurist, they have had great influence in the subsequent judicial decisions upon the subject in the State. Some seventeen years afterward the question was again before the same court at special term, in respect to the rights of the public in the Seneca river, when E. Darwin Smith, J., among other things, said: "Rivers navigable in fact, in all countries, belong to the public. This is so by the common law, by the civil law, and by the French Code.

* * * The State, doubtless, may retain the bed of streams where it has the title; and by grant or patent, in express terms, has bounded the grantee by the shore, as it did, or is claimed to have done, with the Mohawk river. In such case, as the primary source of title, it grants what it pleases, and conveys no more.

* * * By declaring a stream a highway, as in this case, and

as has been done with most of the streams of this State, which could, at any time and in any stage of the water, be navigated with rafts, floats or small boats, the State does not acquire any title to the bed of the stream, or any higher or other right than it possesses in or over ordinary highways upon land. But in respect to all fresh-water streams which are navigable in fact, like the Niagara, the St. Lawrence, the Genesee, and Oswego, below the falls, in these rivers the rights of the public are very different. Such streams are public and belong to the State; as much so, doubtless, as the Hudson, where the tide ebbs and flows; and as much so as the great lakes in the interior of the State" (*The People v. Gutchess*, 48 *Barb. R.*, 656, 666-668).

It has been recently declared by the Court of Appeals of the State of New York that the rule of the common law, as to what degree of capacity renders a river navigable in fact, should be received in this country, with such modifications as will adapt it to the peculiar character of our streams, and the commerce for which they may be used (*Morgan v. King*, 35 *N. Y. R.*, 454). So, it may be confidently affirmed, that the doctrine of the common law upon this subject is not now fully recognized in the State of New York, and that the proprietors of lands upon some of the rivers of the State have less rights in the bed of the streams than was formerly supposed. But, after all, the question depends very much upon the terms of the grant under which the title is claimed; and the construction put upon these documents will be considered in a subsequent chapter. Still, it is of great importance that the general law upon this subject should be well understood, as that will afford a rule by which the rights of riparian owners must in many cases be determined. The doctrine of the common law is fully recognized in Massachusetts, and, perhaps, a majority of the Atlantic States; while in New York, and the most of the remaining States, it is substantially discarded or received with modifications and limitations.

It may be added that the rule, in respect to lands bounded upon a natural water-course, applies also to lands bounded upon an artificial one, unless the same has been changed by some special custom or agreement. *Prima facie*, the law which governs in the case of the one will apply to the other (*Vide Townsend v. McDonald*, 22 *N. Y. R.*, 381, 391; *Dunklee v. Wilton R. R. Co.*, 24 *N. H. R.*, 506; *New Ipswich Factory v. Batchelder*, 3

ib., 190). It is sometimes difficult to determine whether the object of the boundary *is* an artificial water-course; but when it is settled that the object upon which the land is bounded is, in fact, a *water-course*, there is no distinction between natural and artificial ones. In either case, the presumption is that the adjacent proprietor has title to the centre of the stream, although this presumption is not a *presumptio juris et de jure*, but yields to evidence displacing the grounds on which it rests.

CHAPTER V.

THE LAW OF BOUNDARY IN RESPECT TO LAKES AND PONDS—RULES APPLICABLE TO LANDS ADJOINING THESE BODIES OF FRESH WATER WHERE THE BOUNDARY IS LIMITED TO THE MARGIN OF THE LAKE OR POND.

THE rule of the common law of England, which presumes the boundary line of two estates separated by a tideless navigable river to coincide with the *medium flum* of the stream, does not apply to the great fresh-water lakes of this country. In the language of the late Chancellor Walworth, in an opinion delivered in the late Court of Errors of the State of New York, "Our large fresh-water lakes or inland seas are wholly unprovided for by the law of England. As to these, there is neither flow of tide nor thread of the stream; and our local law appears to have assigned the shores down to the ordinary low-water mark to the riparian owners, and the beds of the lakes, with the islands therein, to the public" (*The Canal Commissioners v. The People*, 5 *Wend. R.*, 423, 447). And it was declared many years ago, in a case before the Supreme Court of Maine, that the law of boundary, as applied to rivers, would no doubt be inapplicable to the lakes and other large natural collections of fresh water within the territory of the State (*Hathorn v. Stinson*, 1 *Fairf. R.*, 238).

The Supreme Court of the State of New Hampshire has held that where a grant runs to and is bounded upon a lake or large body of standing fresh water, the grant extends only to the water's edge (*State v. Gilmanton*, 9 *N. H. R.*, 461). A similar doctrine has been expressly laid down by the Supreme Court of Vermont; and it was held that the rule, that a grant bounded by a lake

extends to low-water line, applies to creeks which are substantially arms or inlets of the lake (*Fletcher v. Phelps*, 28 *Vt. R.*, 257). The same doctrine is recognized in the State of Maine; but it was said, in one case, that whether a lot of land bounded on a lake is limited to the margin of the lake or not, depends on the manner in which the lake was formed (*Dillingham v. Smith*, 30 *Me. R.*, 370). The Supreme Court of Illinois has held that riparian owners on Lake Michigan own to the line where the water usually stands when unaffected by any disturbing cause (*Seaman v. Smith*, 24 *Ill. R.*, 521). But in respect to the little lake, Muskegan, in the State of Michigan, the Supreme Court of that State has held that the riparian owners have title to the land under the water so far out into the lake as it can be made beneficial for private and personal use, subject to the paramount public rights of navigation and the incidents thereto. The decision seems to have been based on the assumption that neither the national nor State governments have ever asserted any right to the small lakes within the boundary lines of that State (*Rice v. Ruddiman*, 10 *Mich. R.*, 125). The Supreme Court of the United States, however, have held that the riparian owner on the great lakes, as well as on tide-waters has, by grant, statute or immemorial usage, the right to build out such convenient wharves as do not obstruct the public rights of navigation (*Dutton v. Strong*, 1 *Black's R.*, 23).

The Supreme Court of the State of New York has held, that the proprietors of land lying upon Lake Champlain, unless it is otherwise expressed in the grants, own to low-water mark; subject to a servitude to the public, for the purposes of navigation, up to high-water mark. Hand, J., delivered the opinion of the court, and observed: "It seems pretty well settled, in this State, that a grant bounded upon a river generally, above tide-water, takes to the thread of the stream; subject to the servitude of the public interest, liable to the use of the public for the purposes of navigation, where susceptible of such use. There are some opinions the other way, especially as to our large rivers; but the unanimous opinion of our highest court, in the case of *The Commissioners of the Canal Fund v. Kempshall* (26 *Wend.*, 404), declares the integrity of the common-law rule on this subject in this State, and I hope may be considered as settling the question. Perhaps it is otherwise if the stream be a national boundary. * * * The rights of the citizen, as well as those of the State, in such cases,

usually depend in some degree upon treaty; and the sovereign cannot grant beyond the bounds of his territory. However, where the thread of a river not navigable is the boundary between two States, and there are no stipulations in relation to its use, perhaps there is no reason why the common-law rule should not prevail.

But it is contended that this principle does not apply to our lakes. And certainly it would seem preposterous to make the application to the full extent. * * * Although the point perhaps has not been distinctly decided in this State, some of our judges and jurists have not hesitated to declare an opinion, that the law in relation to the rights of riparian owners on rivers, above the flux and reflux of the tide, does not prevail in respect to our large lakes. * * * No doubt the extent of the lake or body of water would have an influence in the construction of the grant. A navigable river would not probably pass, even by a grant extending on both sides of it, unless expressly included in a conveyance from some sufficient authority. Grants of land in this State have embraced within their limits ponds, or what might be called small lakes; many of which have also been included in the computation of the amount of land to be conveyed by the letters patent. But there can be no question in regard to a body of water of the size of Lake Champlain, which covers an area probably of nearly a thousand square miles, including its islands, and is navigable nearly 150 miles. The same principle would embrace Lake Superior, the largest body of fresh water in the world; and larger than any other, salt or fresh, not an arm of the sea—the Caspian excepted. And besides, except at the extremities, as a general thing, this lake has no *flum aquæ*; but is an expanse of still, deep water, in some places ten or fifteen miles in width. It is perfectly clear to my mind that a grant of land, bounded by this lake, does not extend to the middle of it” (*The Champlain and St. Lawrence Railroad Company v. Valentine*, 19 Barb. R., 484, 489–491). This is doubtless the correct doctrine in respect to a lake of the size of the Champlain, even though it did not separate one State from another; but it is held that the rule which applies to those lakes and streams which form the natural boundaries between one country and another is the same, and, upon this principle, it has been held that the common-law rule, as applied to the construction of descriptions in a deed

pounding the premises by or along or upon a river, has no application to lands bounded by the Niagara river; that river forming a natural boundary between this country and a foreign nation (*Kingman v. Sparrow*, 12 Barb. R., 201). The same court has held that the rule does not apply to the beautiful Cazenovia lake, which is an inland lake five miles long, three-quarters of a mile broad, with no current and no means of outlet, not used as a highway for man or goods, and too small to be of practical use for navigation. Stress, however, was very properly put upon the fact that the State took no notice of the existence of the lake when the patent was granted for the land adjoining it. In the patent, it appeared that there was no restriction or exception of the lake, no reference to it, no reservation of the water or land under water; and hence the court held that the lake was embraced within the boundaries of the grant, and as the lake is too small to be of any practical use in navigation, except it be as a connecting link of some internal improvement, the general rule in respect to the great lakes of the country would not apply to it (*Ledyard v. Ten Eyck*, 36 Barb. R., 102).

The Supreme Court of Vermont has laid down the same doctrine in respect to lands bounded on Lake Champlain as that declared by the Supreme Court of New York in the 19th of Barbour; that is to say, such lands extend to the edge of the water at low-water mark. And it was further held that the same rule applies to creeks which empty into a lake, and are substantially arms or inlets of the lake; that is to say, so far as the waters of such creeks ordinarily maintain the same level, and rise and fall with the waters of the lake (*Fletcher v. Phelps*, 28 Vt. R., 257).

It will be remembered that the law of boundary as applied to the sea, and navigable streams below tide-water, is that high-water mark is the boundary, while lands bounded upon the great lakes of our country extend to low-water mark. There are good reasons for the difference in this rule. Lord Hale, in speaking of the shores of the sea, says, there seems to be three sorts of shores, "according to the various tides, viz.: the high spring-tides, which are fluxes of the sea at those tides that happen at the equinoctials;" which he says many times overflow ancient meadows and salt marshes, and the spring-tides, which happen twice a month, at the full and change of the moon; and the ordinary tides which happen between the full and the change of the moon. The land washed

by the first two, he considers as belonging to the subject; and that washed by the last — between high and low-water mark — the shore crossed by the ordinary flux of the sea, as belonging to the king (*Harg. Tracts*, 12, 13, 25, 26). This latter margin or belt, that is between ordinary high-water and low-water mark, is what Lord Hale denominates the shore of the sea. But none of the lakes of this country have any appreciable tide. Lake Champlain, and most similar bodies of fresh water in the country, are high and full in the spring, when replenished by rivers and melting snows; and, as the season advances, become low by the evaporation and efflux of their waters. The annual rise and fall vary in the different lakes, in some lakes ten or fifteen feet, and in others not so much, and the diminution is sometimes sudden and sometimes gradual. In cases of most of these bodies of water, a great deal of land, valuable for agricultural purposes, is necessarily overflowed in the spring, which of course can be of no use to the public, for the purposes of navigation, after the water recedes. The land upon the shores or borders of those lakes, which is inundated in the spring, unlike that which is diurnally (or semi-diurnally) overflowed by the tide, gradually becomes dry and so remains for the season. Its condition, perhaps, bears some resemblance to that which Lord Hale says is overflowed by high spring-tides, and which he says belongs, in England, to the subject and not to the king. Upon this reasoning, the court arrived to the conclusion in the case, in the 19th Barbour, that the proprietors on the border of Lake Champlain might be the owners to low-water mark, unless otherwise limited by the terms of their grants, and such is the rule applied to all of the great lakes of the country. These great navigable bodies of fresh water are properly regarded as public property, and not susceptible of private property more than the sea; but the owner of land, bounded upon these lakes, may claim the soil down to low-water mark, as has been before shown in this chapter.

In speaking of lakes, Vattel, in his celebrated treatise upon the Law of Nations, observes: "If some of the lands bordering on the lake are only overflowed at high water, this transient accident cannot produce any change in their dependence. The reason why the soil which the lake invades by little and little belongs to the owner of the lake, and is lost to its former proprietor, is because the proprietor has no other marks than its banks to ascertain how

far his possessions extend. If the water advances inwardly he loses; if it retires, in like manner he gains; such might have been the intention of the nations who have respectively appropriated to themselves the lake and the adjacent lands; it can scarcely be supposed that they had another intention. But a territory overflowed for a time is not confounded with the rest of the lake; it can still be recognized; and otherwise a town overflowed by a lake would become subject to a different government during the inundation, and return to its former sovereign as soon as the waters were dried up. For the same reasons, if the waters of the lake, penetrating by an opening into the neighboring country, there form a bay, or new lake, joined to the first by a canal, this new body of water and the canal belong to the owner of the country in which they are found, for the boundaries are easily ascertained; and we are not to presume an intention of relinquishing so considerable a tract of land, in case of its happening to be invaded by the waters of an adjoining lake" (*Vattel's Law of Nations*, B. 1, ch. 22, § 275). It will be observed that the learned author here treats the question as arising between two States; it is to be decided by other principles when it relates to proprietors who are members of the same State. In the latter case, it is not merely the bounds of the soil, but also its nature and use, that determine the possession of it; and according to the same high authority, an individual who possesses a field on the borders of a lake cannot enjoy it as a field where it is overflowed. A person who has, for instance, the right of fishing in the lake may exert his right in this new extent; if the waters retire, the field is restored to the use of its former owner. These principles clearly establish the rule that the land of an individual, bounded upon a lake of any considerable size, is the owner of the soil to ordinary low-water mark. It should be added, that if a lake penetrates by an opening into the low lands in its neighborhood, and there forms a permanent inundation, this new lake belongs to the public, upon the principle that all lakes belong to the public, and the proprietor of land adjoining the same would only own to the water's edge at low-water mark, the same as though the lake had originally occupied the whole site (*Vattel's Law of Nations*, B. 1, ch. 22, § 275).

This is the doctrine, in respect to lakes, which is recognized in this country, and in most other continental countries. But it seems that, in Scotland, the soil of public navigable lakes does not

belong to the crown, but to the owners of the adjoining lands, subject to the public right of navigation (*Bell's Principles of Law of Scotland*, § 651). The same principles which would govern the subject in Scotland, would seem also to be applicable to navigable lakes in England. There does not, however, appear to be any very decided authority upon the point. The doctrine was incidentally adverted to in a late case before the English Court of Queen's Bench, indicating, somewhat, the drift of opinion upon the subject, although it was unnecessary to the decision of the case (*Marshall v. Ulleswater Navigation Company*, 3 *Best & S. R.*, 732). But, as has been before remarked, the great navigable lakes of this country are regarded as much public property as the sea, and the lands under them are placed on the same footing with lands under the waters of navigable rivers, and they require a specific grant to enable the riparian proprietor to go beyond the shore at low-water mark, and the grant of the bed of such lakes can only be made to the owner of the adjoining land.

The rule which prevails in respect to land bounded upon fresh-water lakes, applies also to the land of a private individual bounded upon a natural pond; that is, the grant, *prima facie*, extends only to the water's edge or low-water mark; although it is different in the case of an *artificial* pond created by expanding a stream by means of a dam. In such case, the riparian proprietor will go to the thread of the stream in its natural state (*State v. Gilmanston*, 9 *N. H. R.*, 461; *West Roxbury v. Stoddard*, 7 *Allen's R.*, 167). Upon this subject the late Chief Justice Shaw, in a well-considered case in the Supreme Judicial Court of Massachusetts, observed: "Now, the word 'pond' is indefinite. It may mean a natural pond, or an artificial pond raised for mill purposes, either permanent or temporary, and in both cases the limits of such body of water may vary at different times and seasons, by use, or by natural causes; and where the one or the other is adopted as a descriptive limit or boundary, a different rule of construction may apply. A large natural pond may have a definite low-water line; and then it would seem to be the most natural construction, and one which would be most likely to carry into effect the intent of the parties, to hold that land bounded upon such a pond would extend to low-water mark; it being presumed that it is intended to give to the grantee the benefit of the water, whatever it may be, which he could not have upon any

other construction. Where an artificial pond is raised by a dam, swelling a stream over its banks, it would be natural to presume that a grant of land bounding upon such a pond would extend to the thread of the stream upon which it is raised, unless the pond had been so long kept up as to become permanent, and to have acquired another well-defined boundary. But it is difficult to apply either of these rules to the present case, which is that of a pond originally natural, but which has been raised more or less by artificial means. The discovery of this fact, upon applying the deed to the local objects embraced within its descriptive terms, discloses a latent ambiguity. According to a well-established rule of evidence, therefore, it is competent to resort to parol proof, showing all the circumstances from which a legal inference can be drawn, that one or another line was intended by the ambiguous description used in the deed. And this is, in truth, what both parties have done in the present case" (*Waterman v. Johnson*, 13 *Pick. R.*, 261).

In a later case before the same court, Metcalf, J., who delivered the opinion, said: "By the deed under which the plaintiff claims title to the *locus in quo*, he is bounded 'westerly by Phinney's mill-pond,' which, according to the agreed facts, is sometimes called by that name, and sometimes by the name of 'Trout brook,' and which is about thirty rods long, and through which the thread of the stream has always been apparent. On this state of facts, the court are of opinion that the western boundary of the plaintiff's land is the center or thread of the stream, as it unquestionably would have been if the deed had bounded him on Trout brook, the other name by which the water was known and called" (*Phinney v. Watts*, 9 *Gray's R.*, 269). But the same court, at a still later date, held, in emphatic language, that the boundary on a natural pond extends only to low-water mark (*West Roxbury v. Stoddard*, 7 *Allen's R.*, 167).

The Supreme Court of Maine, in a leading case, held that a conveyance of land bounded on a fresh-water pond, which had been permanently enlarged by means of a dam at its mouth, carries the title to low-water mark of the pond in its enlarged state. Shepley, C. J., in his opinion, said: "The use of the waters of such ponds at all seasons is of great importance to the owners of the adjoining lands. When the water is low, its use becomes more desirable and valuable. Such waters are most valuable to the owners of

land adjoining them, for which tide-waters cannot be used. Unless rebutted by some proof, the presumption is that it was the intention of the parties to a conveyance of land, bounded by a pond, that the land should be bounded upon it at all seasons of the year, and not while the pond remained only at the level existing at the time of the conveyance. If the contrary doctrine were adopted, a person who received a conveyance of land adjoining on a pond, when the water was quite low, might convey it to another at a more elevated and yet not high state of the water with a like boundary, and retain a small strip of land between those two water lines; and there might, under the application of the doctrine, be several strips of land thus owned by different persons, when conveyances were made at several different states of the water. No grantor or grantee can be supposed to have intended to produce such results" (*Wood v. Kelley*, 30 *Maine R.*, 47). This case determines that land, bounded on a large natural pond, extends to low-water mark, and that the same rule should apply when the land is bounded upon a natural pond, after it has been for a long time enlarged by artificial means, and thereby becomes permanently fixed in its enlarged form; and there would seem to be no good reason why there should be any difference in the rule in the two cases. In an earlier case the same court decided that where land conveyed is bounded in the conveyance on a pond, the grant extends only to the margin of the pond. And it was said that, in such case, the margin of the pond, as it existed at the time of the conveyance, is the limit, whether the pond was then in its natural state, or raised above it by a dam, or depressed below it by the deepening of its outlet. In the course of the opinion the court remarked: "The proprietors of the pond and of the contiguous land, when they sold to the pond, must have intended to reserve that as a reservoir for the purpose to which it had been appropriated;" and, again: "Had the land been bounded by a river or stream, or upon an artificial pond created by expanding a stream by means of a dam, the riparian proprietor would go to the thread of the stream" (*Bradley v. Rice*, 13 *Maine R.*, 198).

Sufficient has been said in this place, perhaps, to show the principles upon which the boundary of lands upon fresh-water lakes and ponds is determined. The doctrine will be further illustrated when the construction of grants of land adjoining such

bodies of water shall be considered, which will be attended to in a subsequent chapter. The whole subject, of course, depends much upon the size, shape and depth of the lake or pond, and the manner in which it is formed. In the State of Massachusetts great ponds, containing more than ten acres, which were not, before the year 1647, appropriated to private persons, were, by the colony ordinance, made public, to lie in common for public use. This ordinance applied to all those ponds, whether at that time included within the territory granted to a town or to any body of proprietors for the plantation of a town, or not then granted by the government of the colony, if they had not then been appropriated to particular persons, either by the freemen of the town or by the general court (*Vide West Roxbury v. Stoddard*, 7 *Allen's R.*, 158). The question, therefore, is easily determined in Massachusetts; but in most cases the matter must be decided upon established principles and judicial authority.

CHAPTER VI.

THE LAW OF BOUNDARY IN RESPECT TO ISLANDS—PRINCIPLES ON WHICH THE OWNERSHIP OF NEWLY-FORMED ISLANDS IS TO BE DETERMINED.

THE question of property in islands must be settled upon principles discussed in preceding chapters. It has been shown that the common law recognizes an important distinction, as to the use of waters and the property of the soil, between rivers or waters navigable, and those which are not navigable. The former invariably and exclusively belong to the public, unless acquired from it by individuals under grant or prescription. The latter are held to belong to those whose land borders on the waters; so that they have the exclusive right of fishing in front of their own land, and have a property in the bed or soil of the river under the water, subject, however, to an easement or right of passage up and down the stream in boats or other craft for purposes of business, convenience or pleasure. This is called in the civil law a servitude, which is quite consistent with the right of property. There appears, however, to be an important difference between the common and the civil law, in regard to the rights of the public

and individuals, upon this subject. By the former, the right of the king or the public is limited to those places, whether bays, coves, inlets, arms of the sea or rivers, in which the tide ebbs and flows, this being the common-law definition of navigable waters; whereas, by the civil law, all rivers properly so called, even above tide-water, provided they are navigable by ships or boats, or, perhaps, any other floating vehicle, are considered as public property. The doctrine of the common law, in this respect, is recognized to the fullest extent in some of the American States; the doctrine of the civil law in others; and in still others, the doctrine of the common law is received, restricted and modified, so as to meet the exigencies of the case. According to the rule, everywhere adopted in this country and in England, if an island rises in the sea, it belongs to the sovereign or the public, though by the civil law it belongs to the discoverer or first occupant. If an island be formed in a navigable river, the same rule of the common law gives it to the sovereign, but the civil law to the owners of the land on each side. Should the island, however, arise in an unnavigable river, both the civil and the common law agree in assigning it to the adjoining proprietors. If the *medium filum* of the stream bisects the island equally, each proprietor will take an equal share; but if unequally, then the larger share will belong to him to whose land it is nearest. But should the island arise, not in the middle, but entirely on one side of the stream, then the whole of the island will belong to the owner of the land on that side. This is the general rule upon the subject, and it is usually applied by all the courts of this country. In all cases where the title to the soil under the water is in the public, a newly-formed island in such body of water belongs to the public, as in the case of the sea, navigable rivers and the large fresh-water lakes of this country. And in all cases, where the soil under the water belongs to the riparian proprietors bordering upon the water, the newly-formed island in such body of water will belong to the riparian owner. That is to say, the doctrine which governs in respect to the soil under the water, will control in respect to the island formed in such water. The owner of the soil under the water, by the general laws of property, becomes entitled as of right to all accessions.

The doctrine of the courts upon the subject will be understood by a brief reference to authorities. A leading case in the State of Massachusetts came before the Supreme Judicial Court of the

State in 1826, which involved the right to an island in the River Pawtucket. This case recognizes the rule of the common law, that the property in the soil of rivers not navigable, subject to public easements, belongs to those whose lands border upon them ; and from this right of property in the soil in the bed of the river the court deduce the right of property in an island, which gradually arises above the surface and becomes valuable for use as land. Assuming the thread of the river as it was immediately before such island made its appearance, this rule assigns the whole island or bare ground formed in the bed of the river, if it be wholly on one side of the thread of the river, to the owner on that side ; but if it be so situated that it is partly on one side and partly on the other of the thread of the river, it shall be divided by such line, and held in severalty by the adjacent proprietors. This is clearly the doctrine of the case, and it was held that the dividing line between the adjacent proprietors will run in the same manner as if there were no island in the river (*Ingraham v. Wilkinson*, 4 *Pick. R.*, 268). The doctrine was again recognized by the same court, nine years afterward, when it was held that where an island is so formed in the bed of a river, not navigable, as to divide the channel and lie partly on each side of the thread of the river, it will be divided between the riparian proprietors of the opposite sides of the river according to the original thread of the river. So held in respect to an island formed by alluvial deposits in the Deerfield river in the central part of the State, and a tributary of the Connecticut (*The Inhabitants of Deerfield v. Arms*, 17 *Pick. R.*, 41). And the doctrine was again approved by the same court in 1852, in which it was held that if the course of a river not navigable changes, and cuts off a point of land on one side, making an island, such island still belongs to the original owner. In such case, if the old bed of the river, being gradually deserted by the current, fills up and new land is formed, such newly-formed land belongs to the opposite riparian proprietors respectively, to the thread of the old river. And if new land be formed in the river above said island, and not by slow, gradual and insensible accretion to it, such new land above belongs to the opposite riparian proprietors to the *flum aquæ* or thread of the river. The thread of the river in such case was held to be the medium line between the shores or natural water-lines on each side at the time the new land was formed, without regard to the channel or deepest

part of the stream. The land in controversy was newly-made land, formed in what was formerly the bed of the Connecticut river, lying between the towns of Hatfield and Hadley. The land had been gradually formed in consequence of a change in the bed of the river. On the east side of the river was a tract of land known as the school meadow land, bounded formerly by a curved line projecting considerably into the river. As long ago as 1805 or 1806, the water in high freshets began to find its way across the school meadow land. This increased from year to year, until the current was formed that way ; and in 1825, a great portion, if not the main body of the stream passed that way, thus making a more direct line across, instead of following the former bend of the river. This continued to increase until it became the main channel and the current through the old passage ceased. The new channel, thus formed, cut off and insulated the most projecting part of the school meadow land ; the part thus left remained unchanged in position and became an island, forming the right bank of the new stream as far as it extended. The question was as to the title of this island thus newly formed, and Shaw, C. J., who delivered the opinion of the court, among other things, said : "It has been repeatedly settled, both in this State and in Connecticut, that the Connecticut river, though valuable for the purposes of boating and rafting, yet, so far as riparian proprietorship is concerned, is considered a river not navigable, as that term is used in the common law" (*Adams v. Peese*, 2 Conn., 481 ; *Bardwell v. Ames*, 22 Pick., 333).

The general rule, as a rule of the common law of England, was long since laid down as unquestionable by Lord Holt, who says, in the case of *Rex v. Wharton* (*Holt*, 499), that a river, of common right, belongs to the proprietors of the land between which it runs, to each that part nearest his land. * * * And the same rule has been repeatedly declared and adjudged in this commonwealth. It is derived mainly from the rule, that the riparian proprietor is owner of the soil under the water, and by the general law of property becomes entitled as of right to all accessions. * * * It may be added here, on the authority of Lord Hale, that he derives the title to islands, in creeks or havens or arms of the sea, from the right of property in the soil under the water, stating that this is *prima facie* and of common right in the king ; yet if, in point of propriety, it doth belong to a subject, will

belong to the subject. This is applicable, by strict analogy, to the case of a river not navigable, where the right of property is admitted to be in the riparian proprietor *ad filum aquæ*. * * * Now, as to this island, it is not newly made, but a portion of the old school meadow land, and is, as it was before, the property of the demandants." In the final disposition of the case, the court laid down the rules first stated, with the express approval of the other Massachusetts cases referred to (*Trustees of Hopkins Academy v. Dickinson*, 9 *Cush. R.*, 544, 547, 550, 551).

This is also the doctrine as laid down by the courts of South Carolina. In a recent well-considered case in that State it was held that islands in rivers fall under the same rule, as to ownership of the soil and its incidents, as the soil under water does; if not otherwise lawfully appropriated, they belong to the riparian proprietor on one side, or are divided in severalty between the proprietors on both sides, according to the original dividing line, or *filum aquæ*, as it would run if the islands were under water. The *filum aquæ* is ascertained by measurement across from ordinary low-water mark on one side to the same on the other side, without regard to the channel or depth of water. When the island is appropriated, the boundary is then midway between that and the main land. And it was held, in the same case, that a grant or conveyance of land, bounded by a river not technically navigable, extends to the medium *filum aquæ*, unless the terms used in the writing clearly denote the intention to stop short of that line (*McCullough v. Wall*, 4 *Rich. R.*, 68). And Chief Justice Shaw remarked, in the case in the 9th of Cushing, that, "in ascertaining the thread of the river, it will be proper to take the middle line between the shores upon each side, without regard to the channel or lowest and deepest part of the stream. And in ascertaining the shores, or water lines on each side, to measure, it will be proper to find what those lines are when the water is in its natural and ordinary stage, at a medium height, neither swollen by freshets or shrunk by drought."

The old Supreme Court of the State of New York decided that, when the water of a river is divided by an island, so that only *one-fourth* of the stream descends on one side of the island, and the residue on the other, the owner of the shore where the largest quantity of water flows is entitled to the use of the whole water flowing there; and the owner of the other shore has no right to

place obstructions at the head of the island to cause one-half of the stream to descend on his side of the river. This is an interesting case, but it does not *directly* involve the title to the island; or, there is no reference to that in the decision of the court (*Crocker v. Bragg*, 10 *Wend. R.*, 260).

The Supreme Court of the United States decided, at an early day, that the boundary of the State of Kentucky extends only to low-water mark on the western or north-western side of the River Ohio, and does not include a peninsula, or island, on the western or north-western bank, separated from the main-land by a channel or bayou, which is filled with water only when the river rises above its banks, and is at other times dry; and the rule was declared that, where a river is the boundary between two nations or States, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when, as in the case before the court, one State (Virginia) is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly-erected State extends to the river only, and the low-water mark is its boundary. Mr. Chief Justice Marshall delivered the opinion of the court, and said: "If a river, subject to tides, constituted the boundary of a State, and at flood the waters of the river flowed through a narrow channel, round an extensive body of land, but receded from the channel at ebb, so as to leave the land it surrounded at high water connected with the main body of the country, this portion of territory would scarcely be considered as belonging to the State on the opposite side of the river, although that State should have the property of the river. The principle that a country bounded by a river extends to low-water mark—a principle so natural and of such obvious convenience as to have been generally adopted—would, we think, apply to that case. We perceive no sufficient reason why it should not apply to this" (*Handy's Lessee v. Anthony*, 5 *Wheaton's R.*, 374). And the same high court held, in a much later case, in which it appeared that, at the cession from Georgia to the United States, in 1802, of all the land "west of a line beginning on the western bank of the Chattahoochee river," and running thence up the said River Chattahoochee and along the western bank thereof, that Georgia retained the bed of the river as far as the natural line, marked by the action of the running water, dividing the bed of the river

from the western bank, and that Georgia retained the land west of this line as far as the top of the bluff on the western bank; thereby declaring the doctrine that where a power is possessed of a territory embracing a river, and grants all of the same lying on one side of the river to another power, making the river the boundary, the first power retains the entire river, unless the same is expressly relinquished (*Howard v. Ingersoll*, 13 *How. U. S. R.*, 381). These principles, of course, would determine the rights to an island formed in the midst of a river constituting the boundary between two States, because it is well settled that the title to the island must depend upon the question of the ownership of the soil in the bed of the river at the time the island was formed.

The old Supreme Court of the State of New York held that a grant of a river, *eo nomine*, will not pass the soil of the river, or an island within it. Woodworth, J., delivered the opinion of the court, and said: "With respect to the *island*, the plaintiff's right depends on the expression of the original lease. The farm demised lies on the south side of, and adjoining the river. The last course but one extends to the river; thence up the said river as it winds and turns (including the same) to the place of beginning. The question is, what do these words grant? It is laid down in *Co. Lit.*, 4, b, that 'if a man grant *aquam suam*, the soil shall not pass; but the piscary within the water passeth therewith.' The same rule is recognized in *Com. Dig.*, Grant (*E.* 5). No right, then, to the island was acquired; and all testimony, as to the defendant's possession of that part of the premises in question, was properly excluded" (*Jackson v. Halstead*, 5 *Cow. R.*, 216, 219). If the island was fairly embraced within the limits of the grant, of course the title to it would be in the grantee, the same as though it consisted of the original bed of the river (*Vide Church v. Holland*, 14 *Mass. R.*, 149; *Johns v. Davidson*, 15 *Penn. R.*, 512).

The Supreme Court of Pennsylvania has held that title to islands lying within the River Susquehanna, or its branches, cannot be acquired by actual settlement and improvement; but by the Pennsylvania act of March 6th, 1793, directing the sale of certain islands in the Susquehanna, or its branches, an improver had two years to obtain a warrant and have a survey made, and in case of his neglect for that time the island was subject to application by any other person; and though it was incumbent on the improver

to state the nature of his improvement, and when and by whom it was made, this was not necessary in the application of another who applied for the island more than two years after the improver had neglected to make application for it. Where the Mifflin and Huntingdon join at the Juniata river, at their southern points of junction, the courts hold that their respective boundaries do not extend *usque ad filum aquæ*; but the whole bed of the Juniata river from that point up to Jack's Narrows is in Mifflin county, and the islands in the river belong to the latter county (*Johns v. Davidson*, 16 Penn. R., 512).

It will be borne in mind that the doctrine in Pennsylvania, in respect to the title in the beds of the rivers of that State, is somewhat different from the rule at common law, or of that which is recognized in most of the other States. But the ownership of newly-formed islands in the rivers of that State is determined by the same principles as are held to govern in other States; that is, the title to the island will be in the owner of the soil under the river where the island may be formed. At no time in the history of Pennsylvania, either before October 13, 1760, or since, have islands in her large rivers been open to settlement on the same terms with fast land generally. They could only be settled on agreed terms with the proprietors (*Fisher v. Carter, Wallace, Jr. R.*, 69). But this doctrine has no necessary bearing upon the question of boundary as affected by newly-formed islands in the rivers of the State. When islands *de novo* arise, it is either by the recess or sinking of the water, or else by the exaggeration of sand and rubbish, which, in process of time, grow firm land environed with water, and *prima facie* and of common right they belong to the proprietor of the bed on which they are formed.

CHAPTER VII.

THE LAW OF BOUNDARY AS AFFECTED BY MARITIMA INCREMENTA, OR INCREASE OF LAND BY THE SEA, AND THE RULE IN RESPECT TO ALLUVION AND RELICTION — HOW ALLUVION AND RELICTION ARE TO BE DIVIDED AMONG THE PARTIES ENTITLED TO THEM — THE RULE IN RESPECT TO AVULSION.

THE rule in respect to the title to *maritima incrementa*, or increase of land by the sea, has been much discussed by elementary writers, and is well settled by the courts. This increase is of three kinds, one of which, that *per insulæ productionem*, or islands, was considered in the last preceding chapter. Two other species, strictly embraced in this branch, remain to be considered; that is, increase *per projectionem vel alluvionem*, or alluvion, and increase *per relictionem vel desertionem*, or reliction. These belong to the sovereign or the owner of the land adjacent, according to circumstances, which must be noticed. The increase *per alluvionem*, according to Sir Matthew Hale, is, where the sea, by casting up sand and earth, by degrees increases the land, and shuts itself out further than the ancient bounds went, which is very usual. This he says belongs to the crown, and the reason he gives for the rule is, "because in truth the soil, where there is now dry land, was formerly part of the very *fundis maris*; and consequently belonged to the king." "But indeed," he adds, "if such alluvion be so insensible that it cannot be by any means found that the sea was there, *idem est non esse et non apparere*; the land thus increased belongs, as a perquisite, to the owner of the land adjacent" (*Hale de Jure Maris*, part 1, ch. 4, § 2). This is undoubtedly a correct view of the case. Where the increase arises from the sudden recession of the water, the ground, which is termed derelict land, will go to the crown or to the public, and not to the adjoining owner. But where the accretion is made so gradually and imperceptibly that no one can perceive how much is added in any one moment of time, then the increase goes to the owner of the adjoining land though the right to the shore may remain in the sovereign (*Vide Rex v. Yarborough*, 3 Barn. & Cres. R., 91; S. C., 5 Bing. R., 163; S. C., 10 Eng. C. L. R., 19). The case of *Rex v. Yarborough* was taken to the House of Lords and was there affirmed (2 Bligh's R., N. S., 147; S. C., 1

Dow's R., N. S., 176). It involved the right of soil connected with tide-water, but the discussion was of much interest upon the general subject of the right of accretions connected with fresh water lakes and rivers, as well. The counsel for the crown quoted the passage from Lord Hale's *De Jure Maris*, hereinbefore given, and Abbott, C. J., who delivered the opinion of the Court of King's Bench, said: "In these passages, Sir Matthew Hale is speaking of the legal consequence of such an accretion, and does not explain what ought to be considered as accretion insensible or imperceptible in itself, but considers that as being insensible, of which it cannot be said, with certainty, that the sea ever was there. An accretion extremely minute, so minute as to be imperceptible even by known antecedent marks or limits at the end of four or five years, may become, by gradual increase, perceptible by such marks or limits at the end of a century, or even of forty or fifty years. For it is to be remembered, that if the limit on one side be land, or something growing or placed thereon, as a tree, a house or a bank, the limit on the other side will be the sea, which rises to a height varying almost at every tide, and of which the variations do not depend merely upon the ordinary course of nature at fixed and ascertained periods, but in part also upon the strength and direction of the wind, which are different almost from day to day. And, therefore, these passages from the work of Sir Matthew Hale are not properly applicable to this question. And, considering the word 'imperceptible,' in this issue, as connected with the words 'slow and gradual,' we think it must be understood as expressive only of the manner of the accretion, as the other words undoubtedly are, and as remaining imperceptible in its progress, not imperceptible after a long lapse of time. And taking this to be the meaning of the word 'imperceptible,' the only remaining point is, whether the accretion of this land might properly, upon evidence, be considered by the jury as imperceptible. No one witness has said that it could be perceived, either in its progress, or at the end of a week or a month. One witness, who appears twice to have measured the land, says 'that, within the last four years, he could see that the sea had receded,' but he did not say how much; the same witness said, 'that it certainly had receded since he measured it last year,' but he did not say how much; and, according to his evidence, the gain in a period of twenty-six or twenty-seven years was, on the

average, about five yards and a half in a year. Another witness speaks of a gain of 100 to 150 yards in fifteen years; a much greater increase than that mentioned by the first witness; and this second witness adds, that during the last five years there had been a visible increase in some parts of from thirty to fifty yards. Upon the evidence of this witness, it is to be observed, that he speaks very loosely, the difference between 100 and 150 in fifteen years, and between thirty and fifty in five years, being very great. The third witness said there had been some small increase in every year. The fourth witness said, 'the swarth increases every year gradually, and *perhaps* it had gathered a quarter of a mile in breadth in some places within his recollection, or during the last fifty-four or fifty-five years, and in some places it had gathered nothing.' And this was the whole evidence on the subject. We think the jury might, from this evidence, very reasonably find that the increase had not only been slow and gradual, but also 'imperceptible,' according to the sense in which, as I have before said, we think that word ought to be understood." In connection with the question of alluvion, it is important to understand the meaning of this word "imperceptible," and these observations of Chief Justice Abbott are therefore quite pertinent, as giving the legal interpretation of the word. Alluvion is defined by the French law to be an "increase of land, which is made by degrees (*peu à peu*) on the shores of the sea, of navigable and other rivers, by the earth which the water brings there" (*Guyot's Repertoire Universelle*, 113); and this is substantially the same as the word is defined by the Roman and Spanish laws, and perhaps it may be regarded as a very fair interpretation of the term.

According to the definition which has been given of alluvion, an imperceptible accretion means one which is imperceptible in its progress, and not one which is imperceptible after a lapse of time; and, therefore, although the quantity of land gained from the sea may eventually be very great, the sovereign or the public will not be entitled to it if it was added insensibly and by slow degrees. By alluvion, as used in law, is meant such slow, gradual and insensible accretion that it cannot be shown at what time it occurred (*Trustees of Hopkins Academy v. Dickinson*, 9 *Cush. R.*, 551). This is the rule of the common law upon the subject; and that of the civil law is the same. The latter gives it as follows: "That ground which a river has added to your estate by

alluvion becomes your own by the law of nations; and that is said to be alluvion which is added so gradually that no one can judge how much is added in each moment of time" (*Coop. Inst., tit. 2, § 1; Angell on Watercourses, § 53*). Says Mr. Phear, an English elementary writer: "Where a stream changes its course by slow and imperceptible steps the riparian proprietors are obliged to accept the consequent alteration in their boundaries; but where the shifting is sudden and well marked the original *medium filum* continues to be the border line, and the stream, so far, passes entirely within the land of the one proprietor (*Harg. Tracts, De Jure Maris, cap. 1; 2 Bla. Com., 262*). If an island is formed by natural causes the property in it remains apportioned in the same manner as was, before its appearance, the property in the soil on which it stands (*2 Bract., lib. 2, cap. 2, ¶ 2; 2 Bla. Com., 261; Schultes, 118*). * * * The large size of the rivers in America, and their enormous power of denudation and deposition, have given this point a pre-eminence in that country which it does not possess here; and, accordingly, it will be found to have received in the American text-books much more elaborate treatment than it requires in England" (*Phear Rights of Water, 12*).

What, then, is usually understood by the word alluvion is the gradual accumulation of alluvial deposit upon the banks of a river or the sea; and a man's land is said to be added to by alluvion where the accretion is made so gradually and imperceptibly that no one can perceive the moment when the addition was made. That is to say, in order to acquire title to land as alluvion it is necessary that its increase should be imperceptible; that the amount added in each moment of time should not be perceived. Where the change is so gradual as not to be perceived in any one moment of time, the proprietor, whose land on the bank of a river or the sea is thus increased, is entitled to the addition (*Vide Hulsey v. McCormick, 18 N. Y. R., 147*). The authorities upon the subject are numerous and decisive.

The courts of Maryland have held that lands formed by accretion belong to the riparian proprietor, and cannot be granted by the State as vacancy (*Patterson v. Gelston, 23 Md. R., 432*). To the same effect is a decision by the Supreme Court of Pennsylvania, by which it was held that the accretions to land from a river belong to the riparian owner, and that such accretions are

justly included in describing the quantity of the land (*Morgan v. Scott*, 26 Penn. R., 51). And the Supreme Court of Iowa has recently affirmed the same doctrine, holding that land formed by alluvion on a navigable river between the meander line and the water's edge belongs to the owner of the adjoining land (*Krant v. Crawford*, 18 Iowa R., 549). These were cases of alluvion in the true sense in which the word is used. And the Supreme Court of New Hampshire has recently made a decision, holding that, where the channel of a river has been gradually changing for years by wearing away the bank on the defendant's side, and by adding and forming accretions upon the opposite shore, owned by the plaintiff, by slow and imperceptible degrees, the channel, as so changed, must be regarded as the rightful and accustomed channel, for the time being, as between the different parties; and that such accretions become the property of the land-owner upon that side of the river, and are as much entitled to protection as his original inclosure (*Gerrish v. Clough*, 48 N. H. R., 9). So, also, the Supreme Court of Missouri has very recently decided that a riparian proprietor of land in St. Louis, whose lot is bounded on one side by the Mississippi river, is entitled to alluvial accretions formed upon the shore as far as the middle thread of the river (*St. Louis Public Schools v. Risley*, 40 Mo. R., 356). There is no question as to the doctrine, where the accretions are formed by slow and imperceptible degrees, so as to answer to the legal definition of alluvion.

Whether there is any distinction between the case of alluvion formed by natural or artificial means, the decisions are not entirely decided. But the better opinion is that if, by some artificial structure or impediment in the stream, the current should be made to impinge more strongly against one bank, causing it imperceptibly to wear away, and causing a corresponding accretion on the opposite bank, the riparian owner would be entitled to the alluvion thus formed, especially as against the party who caused it; as was well suggested by Pratt, J., in giving the opinion of the court in a case decided by the New York Court of Appeals, if the accretion was formed under all the circumstances necessary to constitute it alluvion, it can hardly be supposed that a person could successfully resist the otherwise valid claim of the riparian owner, by alleging his own wrong, by showing that the accretion would not have thus formed if he had not himself wrongfully

placed impediments in the stream (*Halsey v. McCormick*, 18 N. Y. R., 147, 150). And the present Supreme Court of the State of New York has held that, where *artificial accretions* are made to the bank of a public highway, extending to a river, they become part of such highway; but when added to a portion of the bank, over which no such right of passage existed, they are a gain to the adjoining proprietor, and not subject to a right of use or passage in consequence of the right of navigation which previously existed through displaced waters (*Wetmore v. The Atlantic White Lead Co.*, 37 Barb. R., 70).

The Supreme Court of the United States have lately held that alluvion attaches only to the land bordering on the streams from which the alluvial soil is derived; and where such land has been sold, the original estate of which it formed a part has no right of alluvion (*Sauset v. Shepherd*, 4 Wallace's R., 502). And the Supreme Court of Mississippi has also lately decided that the principle by which the right to alluvion is determined is that the riparian proprietor, who is liable to loss by floods, is entitled to the increase which may result from the like cause. And it was held that, where a lot was originally granted, bounding on a street, although the grant describe this front as facing on the river, the grantee is not a riparian proprietor, and, as such, entitled to alluvion formed on the opposite side of the street (*Smith v. St. Louis*, 30 Mo. R., 290).

It has been recently decided by the Supreme Court of Louisiana that the alluvion belongs to the owner of the soil situated on the edge of the water, whether it be a river or a creek, and whether the same be navigable or not; but he is bound to leave public that portion of the bank which is required by law for the public use (*Barrett v. New Orleans*, 13 La. An. R., 105). The eastern line of the city of St. Louis, as it was incorporated in 1809, is as follows: From the Sugar Loaf due east to the Mississippi; "from thence, by the Mississippi, to the place first mentioned." The Supreme Court of the United States held that the last case made the city a riparian proprietor upon the Mississippi; and, as such, it was entitled to all accretions as far out as the middle thread of the stream. And it was declared that this rule, so well established as to fresh-water rivers generally, is not varied by the circumstances that the Mississippi, at St. Louis, is a great and public water-course; and that the rule, with respect to tide

water rivers, where the tide ebbs and flows, does not apply to such a case as that stated (*Jones v. Goulard*, 24 How. R., 41). And in this connection it may be convenient to have it noted that the Supreme Court of the United States have very recently held that the act of Congress of June 13, 1812, reserving certain lands in St. Louis for the benefit of the public schools of that city, was not intended to reserve lands made by accretion to lots bordering on the river, which were inhabited, cultivated and possessed by persons at the time of the cession of 1803, and which have since continued to be so inhabited (*Schools v. Risley*, 10 Wall. R., 91).

In matters respecting alluvion, it is obvious that the first question to be settled is whether the accretions are in fact alluvion or not. If they have been made by a lateral increase, that is, by imperceptible degrees, so that no one can know how much was added in each moment of time, the law declares the accumulations to be alluvion; and when this is so determined, the rule is well settled that the alluvion belongs to the proprietor of the land at the edge of the water. If the additional soil was made suddenly, and not by imperceptible degrees, it is not alluvion, and belongs to the owner of the bed of the stream, or the soil under the water where it originally flowed.

It will be pertinent and useful to insert in this place an extract from some very learned observations made by the late Edward Livingston, a distinguished jurist and statesman, in a controversy in the early part of the present century, respecting the title which he had acquired to some lands at New Orleans, formed by gradual deposits from the annual inundations of the Mississippi river, and called the Batture. It was contended, in opposition to Mr. Livingston's claim, that the alluvion must be formed slowly and imperceptibly, so that the time of the incorporation of each part with the original soil cannot be discovered; and that the land in question was not alluvion because its increase was *perceptible*. This was what elicited the reply which is contained in the paragraph quoted. Mr. Livingston said: "When the ingenious counsel can analyze the different deposits, separate the sands of the Red river, the rich mould of the Mississippi from the clay and other various soils which the Mississippi receives from a thousand tributary streams,—when he can dive into its turbid eddies, watch the moment of the previous deposit, and date the existence of each

stratum of its increase, — then this first branch of the authority he has cited (*quantum quoque temporis momento adjicientur*) may be applicable to his cause" (2 *Hall's Law Journal*, 307, 327, 328). Mr. Livingston eventually sustained his claim to the land, though the "law's delay" was such that the fruits of his victory were not fully realized in his own lifetime.

"There are three successive stages in the formation of alluvium, viz., the crumbling of the mineral crust of the earth, by the action of tides, currents, streams and atmospheric agency ; the transportation of the loosened fragments, and their deposition in the form of alluvion at the bottom of rivers, lakes, estuaries and the ocean.

"The mineral substances of most rocks have a tendency to combine with the oxygen of the atmosphere, under particular conditions of heat, moisture and electricity ; carbonic acid and water are absorbed by many rocks ; vicissitudes of temperature tend to expand, contract, split and disintegrate rocks ; lightning often shivers a rock into innumerable fragments ; every shower of hail or rain works off fragments more or less numerous from the surface of rocks ; so that by these combined agencies of air, moisture, carbonic acid, heat, electricity, hail and rain, there is a constant wearing of the substance of solid rocks. It is true that these agencies work very slowly when the bulk of the rock is considered ; but as time, in geological phenomena, is reckoned by ages or centuries instead of by years, this slowness does not throw any improbability over the alleged action of meteoric fires on solid rocks.

"Another kind of agency is the power of a running stream to wear away the banks and rocks against which it rubs. The force of water, when directed against any obstacle in its course, is very considerable, even by its own weight alone, especially if it be flowing over a highly inclined surface ; but its destructive power is greatly augmented if it be loaded with sand and gravel. * * *

* The formation of *valleys* by the erosive power of running water is another cause of the accumulation of alluvium. * * *

Among the Alps, gorges have been scooped out to the depth of 600 or 700 feet by the action of running water alone. Such facts as these are sufficient to show that a rapidly flowing river exerts a powerful disintegrating force.

"The wearing and transporting powers of rivers depend upon the volume of water, the quantity and size of the solid mat-

suspended and the velocity with which it moves. * * * The tortuous courses of rivers where they are cut through solid rock, as in the case of the Moselle, whose banks are sometimes 600 feet high, are among the strongest proofs of the destructive power of running water; for no sudden deluge, however powerful, could have scooped out such a trough; and that a cleft of such a nature should be occasioned by any disruption of the earth's crust is not less improbable. More sudden, and therefore more striking, instances of the waste of the land occur where a river flows through a lake, and by its wasting action causes a breaking down of the barrier.

"The distance to which the detached fragments are carried depends upon the volume of water, and the nature of the ground over which it flows. The torrents from the south-western Alps, rushing over a steep uninterrupted slope, transport large blocks to the sea; but a river that runs through a long stretch of level country deposits the grosser matter in the upper part of its course, and carries to its mouth only that which is more easily held in suspension. The larger stones, after being detached from their parent rock, have therefore to undergo an immediate process of abrasion, by being rubbed against each other in the bed of the stream, before their particles are finally committed to the deep. If a river pass through a lake in its course, the solid matter will be deposited in that trough until it has filled it up; and if the lake be very large even the lighter particles will have time to fall, and the water will flow out clear from the other extremity.

* * * In a mountainous country, where the land rises rapidly from the shore, the rivers descending over a steep bed sweep all the contents into the sea. If the neighboring sea be deep, and the tides be strong, an estuary or inlet is formed at the mouth of the river; that is, the sea forms a deep indentation into the land of a triangular shape. If, on the other hand, a low shelving shore, and the absence of strong tidal currents, favor the gradual and tranquil deposit of the solid matter brought down by the river, an extensive level of alluvial land is formed. * * * Such, then, are the numerous modes in which alluvium is formed, and fitted to become the basis of a rich vegetable soil, by converting into dry land tracts which were before covered with water" (*National Cyclopædia*, vol. 1, tit. "*Alluvium*"). Perhaps these statements may be regarded as more scientific, than anything

else, but they will help to enable one to determine what is legal alluvion in a given case.

In determining the manner in which land formed by alluvion in a river is to be divided among the several riparian proprietors entitled to it, the courts have established well-defined rules. A case has but just been decided by the Supreme Judicial Court of New Hampshire, which involved the right to land formed by alluvion, on the bank of a river not navigable, by the gradual wearing away of the opposite bank. The court declared that in such a case the ordinary rule for dividing the alluvion among the riparian owners entitled to it, is to ascertain the length of the old shore line, and of the part of it belonging to each proprietor; then measure off for each proprietor a part of the new shore line in proportion to what he held in the old shore line; and then draw lines from the boundaries at the ancient bank to the points of division on the new shore as thus ascertained. In this way, it was said, if such land is formed in the bend of a river, and the new shore line is just one-half the length of the old one, each proprietor will take of the new shore line just one-half the extent of his former shore (*Batchelder v. Kenisten*, 51 *N.H.R.*, 496; *S. C.*, 7 *Alb. L. J.*, 317).

At an early day, the Supreme Judicial Court of Massachusetts adopted the following rule upon the subject: 1. To measure the whole extent of the ancient banks or line of the river, and compute how many rods, yards or feet each riparian proprietor owned on the river line. 2. The next step is, supposing the former line, for instance, to amount to 200 rods, to divide the newly-formed bank or river line into 200 equal parts, and appropriate to each proprietor as many portions of this *new* river line as he owned rods on the *old*; when, to complete the division, lines are to be drawn from the points at which the proprietors respectively bounded on the *old*, to the points thus determined, as the points of division on the newly-formed shore. The new lines thus formed, it was said, will be either parallel, or divergent, or convergent, according as the *new* shore line of the river equals, or exceeds, or falls short of the old. The court said, however, that the rule may require modification, perhaps, under particular circumstances. For instance, in applying the rule to the ancient margin of the river, to ascertain the extent of each proprietor's title on that margin, the *general* line ought to be taken, and not

the actual length of the line as that margin, if it happens to be elongated by deep indentations or sharp projections. In such a case, the court declared it should be reduced by an equitable and judicious estimate to the general available line of the land upon the river (*Deerfield v. Ames*, 17 *Pick. R.*, 45, 46). The same court reaffirmed the rule in a more recent case, wherein Shaw, C. J., said: "The effect of this rule is, to give to each proprietor a length on the new water-line proportioned to his length on the old water-line, whether the one be longer or shorter than the other" (*Trustees of Hopkins Academy v. Dickinson*, 9 *Cush. R.*, 544, 553). And the Supreme Court of the United States have declared their adherence to the same rule. In a late case before that distinguished court, Mr. Justice Swayne, speaking of the rule laid down in the 17th Pickering, said: "With the qualification stated, it may be considered as embodying the views of this court upon the subject" (*Johnston v. Jones*, 1 *Black's R.*, 209, 223; *vide also Jones v. Johnston*, 18 *How. U. S. R.*, 150; *Emerson v. Taylor*, 9 *Greenl. R.*, 44; *Newton v. Eddy*, 23 *Vt. R.*, 319).

The subject of reliction is closely allied with that of alluvion, and both subjects are governed by similar rules. The word reliction signifies land left permanently uncovered by the retreat of the sea or other water, and the principles of law which have been considered with respect to encroachments by the land upon the water apply also to the converse case of encroachments by the water upon the land. Therefore, if the sea rises gradually and imperceptibly, the proprietors whose lands are submerged have no remedy against the sovereign, whose property will consequently extend as far as the new high-water mark (*In re The Hull and Selby Railway Company*, 5 *Mees. & Welsb. R.*, 327). But if the encroachment of the water is sudden and violent no change of property takes place, and therefore, upon the recession of this water after the inundation, every owner will take his land again if it can be known by its boundaries (*Schultes*, 122; *Inst.*, lib. II, tit. 1, 24; 1 *Thomas Co. Litt.*, 47, n.). If the water in a navigable lake recede gradually and insensibly, the land gained belongs to the adjacent riparian owners. But if the reliction be sudden, the increase belongs to the State. So held in a case in North Carolina, wherein it was proved that the lake, upon which the lands in question were bounded, was navigable; and Hall, J.,

in delivering the opinion of the court, said: "If the recession of the lake was sudden and sensible, the land which it had covered, and which, by its dereliction, became dry, would not be and ought not to be included in the defendant's grant. But if the water receded gradually and insensibly, the lake ought to be considered one of the defendant's boundaries. It is, therefore, necessary that the fact be found whether the waters of the lake receded imperceptibly or not from the land in dispute; because on that question the rights of the parties depend" (*Murry v. Sermon*, 1 *Hawks' R.*, 56).

From these principles it follows that if a navigable river slowly and imperceptibly changes its course, the boundaries of the property adjoining the banks will gradually shift with the new channel; but that if the change be sudden, no alteration of the boundaries will take place. If a navigable river suddenly forsakes its natural channel and flows in another bed, the old bed will, by the law of England, belong to the crown, on the same principle as land suddenly relictied by the sea; but, by the civil law, it will belong to the owners of the land on each side, in the same manner as an island formed in a navigable river. According to the civil law, the river bed follows the condition of the river and becomes public; or, rather, the use of it becomes public, while the property in the soil remains to its former owners (*Sandars' Inst., lib. II, tit. 1, 22*). By the common law, also, it would seem that the ownership of the new bed is not altered, but remains in its former proprietors, subject to public uses (*Vide The Mayor of Carlisle v. Graham*, 4 *L. R. Eech.*, 361). Should the river afterward resume its old channel, the strict rule of the civil law assigns the new bed to the owners of the adjacent lands; though in reason and equity it should be returned to its former owners, if they are known; and by the common law there can be no doubt that the ownership of the new bed will remain in those to whom it belonged before any change in the river took place, unless the alteration in the new channel has been so slow and gradual that the original boundaries have been lost (*Hale De Jure Maris*, 5, 6, 11, 13, 16, 37). And if a private stream, which is the boundary between the lands of two proprietors, gradually and imperceptibly changes its course, the proprietor whose ground is encroached upon can claim nothing from his opposite neighbor; but the boundary line between them will shift with the gradual change of the river.

If, however, the course of the river is diverted by some sudden catastrophe, no change of property will take place, and the *medium filum* of the old river will continue to mark the limits of the two estates (*Vide Schultes*, 121; *Ford v. Lacey*, 2 *Jur. N. S.*, 684).

The exact language of the civil law upon the subject is this: "If a river, entirely forsaking its natural channel, hath begun to flow elsewhere, the first channel appertains to those who possess the lands close to the banks of it, in proportion to the extent of each man's estate next to such banks; and the new channel partakes of the nature of the river and becomes public. And if, after some time, the river returns to its former channel, the new channel again becomes the property of those who possess the lands contiguous to its banks" (*Just. Inst.*, lib. II, tit. 1, § 23). And this doctrine is certainly very reasonable, and does not appear to be at variance with that of the common law; but, it is believed, that it can be clearly inferred from the principles of that law, applicable to public rivers.

The law relating to alluvion and reliction is very succinctly stated by Judge Blackstone. He says: "As to lands gained from the sea, either by *alluvion*, by the washing up of sand and earth, so as in time to make *terra firma*, or by *dereliction*, as when the sea shrinks back below the usual water mark; in these cases the law is held to be that, if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For *de minimis non curat lex*; and, besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is, therefore, a reciprocal consideration for such possible charge or loss; but if the alluvion or dereliction be sudden and considerable, in this case it belongs to the king; for as the king is lord of the sea, and, so, owner of the soil while it is covered with water, it is but reasonable he should have the soil when the water has left it dry; so that the quantity of ground gained and the time during which it is gained are what make it either the king's or the subject's property. In the same manner, if a river, running between two lordships, by degrees gains upon the one, and thereby leaves the other dry, the owner who loses his ground thus imperceptibly has no remedy; but if the course of the river be changed by a sudden and violent flood, or other hasty means, and thereby a man loses his ground,

it is said that he shall have what the river has left in any other place as a recompense for this sudden loss" (2 *Black. Com.*, 262).

Mr. Schultes, in his able treatise on Aquatic Rights, draws the conclusion, "that all islands, relictcd land, and other increase arising in the sea and in navigable streams, except under local circumstances before alluded to, belong to the crown; and that all islands, relictcd land, and the soil of inland unnavigable rivers and streams, under similar circumstances belong to the proprietors of the estates to which such rivers act as boundaries; and hence it may be considered as law, that all islands, sand beds or other parcels of agglomerated or concreted earth which newly arise in rivers, or congregate to their banks by alluvion, reliction or other aqueous means, as is frequently observed in rivers where the current is irregular, such accumulated or relictcd property belongs to the owners of the neighboring estates" (*Schultes on Aquatic Rights*, 138).

It may be convenient to understand the meaning of the phrase "bank of a river," or "bank of a stream." The courts have decided that a bank is the continuous margin where vegetation ceases; the shore is the sandy space between it and low-water mark. That is to say, such has been held to be the rule in Pennsylvania (*McCullough v. Wainwright*, 14 *Penn. R.*, 171). By the civil law if a piece of land is torn by the violence of a stream from one man's land and carried to the land of another, it remains the property of its former owner, if it can be detached from its resting place; but if it is allowed to remain for so long a time that it unites with the neighboring soil, and the trees which it sweeps away with it take root in the ground, it will be lost to its former owner, and become the property of him to whose land it has been carried (*Inst., lib. II, tit. 1*, 21). This is called avulsion, and the rule of the civil law in relation to it would seem to be as applicable to the common law as to the civil law. It has been suggested, however, that an equitable action will lie in such case to recover the value of the piece of ground so carried away and united with the neighboring land (*Vide Colquhoun's Summary*, § 981).

CHAPTER VIII.

THE LAW OF BOUNDARY AS RELATES TO SEA-WALLS, EMBANKMENTS, PURPRESTURES, AND THE LIKE — THE RULE AS APPLIED TO NAVIGABLE STREAMS — THE SCOTTISH AND ROMAN LAWS UPON THE SUBJECT — DUTY OF PRESERVING SEA-WALLS AND THE LIKE.

ALTHOUGH the subject of encroachments upon lands belonging to the public or individuals, or upon the sea or other navigable waters, is not directly involved in the question of boundary, yet it is so closely related to it that a brief reference to it may properly be made in this place. By the rule of the civil law the *interdictum utile* lies against any one who projects a mole into the sea at the suit of persons who are thereby injured, but if no one sustains any injury he who builds on the sea-shore or projects a mole into the sea is protected (*Digest*, 43, 8, 3). And by the same law it is said that to repair and strengthen the banks of a public river, so long as the navigation is not hindered, is most useful (*Dig.*, 43, 15, 1). In Scotland, it has been held that the owner of property adjoining the sea-shore may prevent the encroachments of the water by artificial operations, and even by such means gain upon the sea, although some doubt has been thrown upon the accuracy of these decisions by Mr. Bell in his *Commentaries on Scotch Law*. The decisions of the courts, however, carry the doctrine to the extent stated (*Vide Smith v. Earl of Stair*, 6 *Bell's Appeal Cases*, 487; *Bell's Com.*, 723). But the rule is not extended so far by the common law, or the law of England. There can be no doubt that by the law of England encroachments cannot be made on the property of the crown or its grantee (*Todd v. Dunlop*, 2 *Rob. Scotch App.*, 333; *Smart v. Council of Dundee*, 8 *Bro. Par. Cases*, 119; *Round on Rip. Owners*, 7; *Hale de Jure Maris*, 85). But if an embankment which is lawfully made on a man's own land cause a silting up of sand and mud, whereby soil is gradually gained from the sea, the owner of the embankment would appear to be entitled to this increase, upon the principles laid down in respect to alluvion and reliction (*Vide Attorney-General v. Chambers*, 4 *De G. & Jo. R.*, 68, 70). An encroachment upon the king, either upon part of the demesne lands, or in the highways, public rivers, harbors or

common streets, is called a purpresture. This word frequently occurs in the judicial reports of both this country and England, and invariably signifies an encroachment of this kind. Remedies for this species of injury are prescribed, but it is not necessary to refer to them here.

A man may raise an embankment on his own property to prevent the encroachments of the sea, although the effect of his doing so may be to cause the water to beat with violence against the adjoining land, thereby rendering it necessary for the adjoining landowner to enlarge or strengthen his defenses (*Rex v. Paghham Commissioners*, 8 *Barn. & Cres. R.*, 355). But this doctrine is not applicable in the case of embankments by the side of a river, whether public or private; and therefore if a riparian owner embank against an apprehended alteration of the old channel, he must take care in doing so that he does not injure the property of adjoining or opposite proprietors (*Menzies v. Broadalbane*, 3 *Wilson & Shaw's R.*, 243). It is a well-known fact, that the sea occasionally, by some change proceeding from natural and unknown causes, makes gradual inroads on parts of a coast which had been free from its waters for centuries. On such occurrences it has been compared, and justly compared, to a common enemy against which every person may defend himself as he can; but this is perfectly different from an occasional course of superabundant inland water, flowing in the same direction, whenever the occasion happens, and the ordinary channel is become insufficient to carry it off. In the one case, if the works be successful, the water is prevented from coming where, within time of memory at least, it never had come; in the other, it is prevented from passing in the way in which, when the occasion happened, it had been always accustomed to pass. An interesting case involving these principles was decided by the English Court of King's Bench about forty years ago. The case was an indictment for nuisance to a public canal navigation established by act of Parliament, in which it appeared that the canal was carried across a river and the adjoining valley by means of an aqueduct and an embankment in which were several arches and culverts; that a brook fell into the river above its point of intersection with the canal; and that in times of flood the water, which was thus forced back into the brook, overflowed its banks, and was carried, by the natural level of the country, to the above-mentioned

arches, and through them to the river, doing, however, much mischief to the lands over which it passed ; that except for the nuisance after mentioned, the aqueduct would be sufficiently wide for the passage of the river at all times but those of high flood, notwithstanding the improved drainage of the country, which had increased the body of water ; that the defendants, occupiers of lands adjoining the river and brook, had for the protection of their lands, subsequently to the making of the canal, aqueduct and embankment, erected, or heightened, certain artificial banks, called fenders, on their respective properties, so as to prevent the flood-water from escaping as above mentioned ; and that the water had consequently, in time of flood, come down in so large a body against the aqueduct and canal banks as to endanger them and obstruct the navigation ; that the fenders were not unnecessarily high, and that, if they were reduced, many hundred acres of land would again be exposed to inundation.

The court held that the defendants were not justified, under these circumstances, in altering for their own benefit the course in which the flood-water had been accustomed to run ; that there was no difference in this respect between flood-water and an ordinary stream ; that an action on the case would have lain at the suit of an individual for such diversion, and consequently that an indictment would lay where the act affected the public (*The King v. Trafford*, 1 *Barn. & Ad. R.*, 874 ; *S. C.*, 20 *Eng. C. L. R.*, 498). Lord Tenterden, Ch. J., who delivered the opinion of the court, took a distinction between this and the Pagham case in *Barnewell and Adolphus* before referred to. That was a case where commissioners of rivers, acting in good faith for the benefit of the levels for which they were appointed, erected certain defenses against the inroads of the sea, which caused it to flow with greater violence against, and injure the adjoining land not within the levels ; and the Court of King's Bench held that they could not be compelled to make compensation to the owner of the land, or to erect new works for his protection ; for that all owners of land exposed to the inroads of the sea, or commissioners of sewers acting for a number of landowners have a right to erect such works as are necessary for their own protection, even although they may be prejudicial to others. The Lord Chief Justice, in his opinion, observed : " Now, is there any authority for saying that any proprietor of land exposed to the inroads of the sea may not endeavor

to protect himself by erecting a groyne or other reasonable defense, although it may render it necessary for the owner of the adjoining land to do the like? I certainly am not aware of any authority or principle of law which can prevent him from so doing. * * * I am, therefore, of opinion that the only safe rule to lay down is this, that each landowner for himself, or the commissioners acting for several landowners, may erect such defenses for the land under their care as the necessity of the case requires, leaving it to others, in like manner, to protect themselves against the common enemy."

Bayley, J., said: "I am entirely of the same opinion. It seems to me that every landowner, exposed to the inroads of the sea, has a right to protect himself, and is justified in making and erecting such works as are necessary for that purpose; and the commissioners may erect such defenses as are necessary for the land intrusted to their superintendence." Of course, the party must act in good faith, and do no more than is reasonably necessary to protect his lands from the encroachments of the sea (*Rex v. Pagham*, 8 Barn. & Ad. R., 355). The rule is, therefore, quite obvious in respect to lands bounded upon the sea; but it is altogether different in respect to lands bounded upon a river, whether public or private. No building or erection may be set up in the *alveus* of a river, whether it is navigable or private, because in course of time the flow of the stream may be interfered with; and therefore, said Lord Westbury, "any encroachment upon the *alveus* of a river may be complained of by an adjacent or an *ex adverso* proprietor, without the necessity of proving either that damage has been sustained or that it is likely to be sustained from that cause" (*Bickett v. Morris*, 1 L. R., Scotch Appeals, 60; and *vide Attorney-Gen. v. Lonsdale*, 7 L. R., Eq., 377; *Brownlow v. Metropolitan Board of Works*, 13 Com. Bench R. [N. S.], 768; *Cracknell v. Mayor of Thetford*, 4 L. R., C. P., 629; *Wishart v. Wyllie*, 1 Macq. R., 389; *Brown v. Gugy*, 2 Moore, P. C. C., 341).

An important case came before the courts of New York not many years ago, in which these principles were discussed, and the rules declared in respect to unnavigable streams. The action was brought in the Supreme Court to recover damages for obstructing the waters of the Oriskany creek by means of a dam, and causing them to set back upon the premises of the plaintiff. The Supreme

Court held that individuals owning the bed of a stream, and each bank thereof, have the right to build a dam and embankment, and raise the water of the stream as high as they please, subject only to the restriction resting upon all, so to enjoy their own property as not to injure that of another person, with the qualifications and limitations incident to that rule of property. And that if they, in the exercise of that right, build, with due care, an embankment to prevent the water, when raised by their dam above the natural bank of the stream, from overflowing the lands of adjacent owners, and, in consequence of raising their dam, the water finds its way through their own natural soil, and below the surface thereof, by filtration, percolation or otherwise, to the land of an adjacent proprietor, the owners of such dam and embankment are not, in the absence of any unskillfulness, negligence or malice, liable to such adjacent proprietor for any damage he may sustain thereby; the injury being *damnum absque injuria* (*Pixley v. Clark*, 32 Barb. R., 268). The case was taken to the Court of Appeals, where the judgment of the Supreme Court was reversed by a divided court, and the law declared to be: If riparian proprietors use a water-course in such a manner as to inundate or overflow the lands of another, an action will lie. If, by raising the water in a natural stream above its natural banks, and to prevent its overflow, artificial embankments are constructed which answer the purpose perfectly; yet if, by the pressure of the water upon the natural banks of the stream, percolation takes place so as to drown the adjoining lands of another, an action will lie for the damage occasioned thereby. And it was declared that it matters not whether the damage is occasioned by the *overflow* of or the *percolation through* the natural banks, so long as the result is occasioned by an improper interference with the natural flow of the stream. Peckham, J., in an elaborate and learned opinion, among other things, said: "The case, then, stands thus: The defendants are held for drowning the plaintiff's land by an unauthorized interference with a surface stream, by pressing a part of that stream through its banks, by means of their artificial works, into the lands of the plaintiff to his injury. The defendants answer, true, we did that for our benefit; but the law allows a party to interfere with underground, dead or percolating water by sinking a well or digging drains on his own land. The reply is, we have interfered with a surface stream, not with under

ground percolating water, and hence the doctrine of those cases affords you no protection. The point is, that the defendants, by their interference with a surface stream, have wrongfully pressed a part of it into percolated water, and thus drowned the plaintiff's land. * * * An owner may dig upon or cultivate his own land at his pleasure, though he cut off, or open, water circulating or dead under the earth, to his neighbor's injury. Such water is not different from the earth itself. He owns it. He does not own the water of a surface stream, and cannot set it back to another's injury without liability. * * * I have thus examined all the grounds on which the right to do this injury is based, and deem them all untenable. The defendants having violated the rights of the plaintiff, and flowed his land to his damage, law and justice alike require that they should pay that damage" (*Pixley v. Clark*, 35 *N. Y. R.*, 520, 529-532). So it seems that a man may raise an embankment on his own property to prevent the encroachments of the sea, even though it may have the effect to impose a burden upon the adjoining proprietor; but the rule does not apply in the case of embankments by the side of a river or other inland stream. When it is said that proprietors along the banks of a private river are entitled to the bed of the stream as their property *usque ad medium flum*, it does not by any means follow that that property is capable of being used in the ordinary way in which so much land uncovered with water might be used; but it must be used in such a manner as not to affect the interest of riparian proprietors in the stream. Now, the interest of a riparian proprietor in the stream is not only to the extent of preventing its being diverted or diminished, but it would extend also to prevent the course being so interfered with or affected as to direct the current in any different way that might possibly be attended with damage at a future period to another proprietor. This is the doctrine laid down by Lord Westbury in a case before referred to, and it is in accordance with the authorities (*Bickett v. Morris*, 1 *L. R.*, *Sc. App.*, 61). The Lord Chancellor of England, in a case in the House of Lords, on appeal from the Court of Session in Scotland, laid down the law upon the subject thus: "But let us see what is said on this subject by the institutional writers on the Law of Scotland. Erskine, in his *Institutes*, is distinct, as it appears to me, and precise upon the subject. He says: 'Where a river threatens an alteration of the

present channel, by which damage may arise to the proprietor of the adjacent or opposite ground, it is lawful for him to build a bulwark *ripæ muniendæ causa*, to prevent the loss of ground that is threatened by that encroachment ;' so that the proprietor whose lands are threatened to be washed away may, for the purpose of protecting his own property in a case of that description, raise a bank for his own security ; but this bulwark must be so executed as to prejudice neither the navigation, nor the grounds on the opposite side of the river ; and as a guard against these consequences, the builder, before he began his work, was obliged by the Roman law to give security. Nothing, therefore, can be more distinct and precise than the language of Erskine, in his Institutes, with respect to this particular case. He says : ' You may protect your own property from destruction ;' so you may by the law of England ; but he says in distinct terms : ' Though the river threatens to change its channel, and to encroach upon your land, you cannot protect yourself to the prejudice of the opposite proprietor.' Lord Stair, in his Institutes, though not so clear and precise, yet in general terms, confirms that which is laid down by Erskine in his Institutes. The language of the Roman law, according to the passage cited in the case, confirms the same doctrine. * * * It appears to me that that passage (and there are others to the same effect in the Digest) confirms the opinion laid down by Erskine in his Institutes, with respect to the law of Scotland, in confirmation of which he refers to the Roman law. It is true that passages may be found in the Digest, appearing to have a contrary tendency, but I think they may be all reconciled ; or, consider the subject in this light, that these passages to which I am now alluding have reference to accidental and extraordinary casualties, from the flood suddenly bursting forth, and they go to this, that in such a case the parties may, even to the prejudice of their neighbors, for the sake of self-preservation, guard themselves against the consequence ; perhaps in this way, the different passages in the Digest may be reconciled " (*Rex v. Trafford*, 1 *Barn. & Ad. R.*, 874). But it is not important to the objects of this discussion that the subject be further pursued in this place. The subject, to the extent to which it has been considered here, has a close relation to the question of boundary, but the further consideration of it may not be required.

In England the preservation of walls and embankments by the

sea-shore and navigable rivers, and the removal of obstructions in public rivers, devolve, for the most part, on the commissioners of sewers, whose duties and liabilities are determined by certain acts of Parliament called statutes of sewers. In this country the matter is in the hands of Congress and the State Legislatures, and provision is made by legislative enactment. But an individual, corporation or locality may be liable to repair a sea-wall by prescription or custom. Therefore, where the owners of the estate, which a man has, have time out of mind repaired the wall, he will be bound. And where there is a custom in the locality that all those whose lands abut upon the sea shall do the repairs (which is called the custom of frontages), those who have lands fronting the sea will be liable (*Carlis on Sewers*, 115, 116; *Gibbon on Dilapidations*, 348, 349). A person may, likewise, be bound by reason of a condition annexed to his estate; or by covenant, which will bind his heirs, if expressly mentioned, but only to the extent to which they have assets by descent (*Henley v. Mayor of Lyme*, 5 *Bing. R.*, 91; *S. C.*, 3 *Barn. & Ad. R.*, 77). And it has been held that a public company, exercising statutory powers for its own profit, may be obliged to repair sea-walls, to clear away obstructions to navigation, and the like (*Parnaby v. Lancaster Canal Company*, 11 *Adolphus & Ellis R.*, 223; *Manley v. St. Helen's Company*, 27 *L. J., Exch. R.*, 159). A purchaser of lands situated below the level of the sea is bound to inquire how all the defenses, necessary for the protection of the property against the encroachments of the sea, are maintained, and if the vendor has entered into covenants respecting the sea-walls and sewers the purchaser will be bound. It would seem, however, that a covenant to repair a sea-wall would run with the land, and would, therefore, bind a purchaser, even without notice, express or implied (*Moreland v. Baker*, 6 *L. R., Eq.*, 252).

CHAPTER IX.

THE LAW RELATING TO BOUNDARY OF LANDS UPON ROADS AND STREETS — RULE IN RESPECT TO PUBLIC AND PRIVATE WAYS THE SAME — PRESUMPTIONS AS TO WASTE LANDS ADJOINING HIGHWAYS — LAW OF BOUNDARY IN RESPECT TO DITCHES AND WALLS.

WHERE a road divides two estates, whether freehold, copyhold or leasehold, the presumption is that the soil of the road, with the minerals under it, *usque ad medium filum viæ*, and the waste lands and trees by the sides thereof, belong to the adjoining owners. This has been the rule, as recognized by the English courts, time out of memory; and the same rule is universally adopted in this country. A person holding lands bounded upon the highway is held *prima facie* to own to the center of the road. This presumption is allowed to prevail upon grounds of public convenience, and to prevent disputes as to the precise boundaries of property; and it is based on the supposition that when the road was originally formed the proprietors on either side each contributed a portion of his land for the purpose (*Holmes v. Bellingham*, 7 *J. Scott's R.*, *N. S.*, 329, 336). And this supposition, that the proprietors on either side of a highway contributed a portion of his land for the road when it was formed, is based upon the doctrine that there is no presumption that a highway was made before the time of legal memory, so as to vest the soil of it in the lord of the manor; so declared in several leading English cases (*Vide Doe v. Pearsey*, 7 *Barn. & Cres. R.*, 304; *Cooke v. Green*, 11 *Price's R.*, 736; *Scoones v. Morrell*, 1 *Beavan's R.*, 251). Upon this ground, a conveyance of land described as abutting on a road passes a moiety of the soil of the road to the grantee, unless there be something in the context to exclude this construction. Sir J. Coleridge remarked, in a case before the House of Lords, in which the boundary of lands upon a creek was involved: "If lands granted were described as bounded by a house, no one could suppose the house was included in the grant; but if land granted were described as bounded by a highway, it would be equally absurd to suppose the grantor had reserved to himself the right to the soil *ad medium filum*, in the far greater majority of cases wholly unprofitable" (*Lord v. The Commissioners for*

the City of Sidney, 12 *Moore's P. C.*, 473). And in a leading case before the English Court of Common Pleas, the land was described as "bounded by Hall lane," and it was held that the grantee was vested with the soil of Hall lane *usque ad filum viæ*; or in other words that a moiety of the land in Hall lane passed by the conveyance, though it was not *necessary* to include any portion of the lane to make up the quantity of land specified in the grant (*Simpson v. Dendy*, 8 *Eng. C. B. R., N. S.*, 433). And in a late case before the same learned court, after the examination of many authorities, the doctrine was fully recognized, and it was held that, where a piece of land which adjoins a highway is conveyed by general words, the presumption of law is, that the soil of the highway *usque ad medium filum* passes by the conveyance, even though reference is made in the conveyance to a plan annexed, the measurement and coloring of which would exclude it. The counsel for the adverse party expressly admitted the general doctrine, but contended that the language of the conveyance excluded the highway, because that which was intended to be conveyed was precisely defined. But the court held, that admeasurements, accompanied by a reference to a colored plan in which no part of the road was included, were not sufficient to rebut the presumption that a moiety of the road was intended to be conveyed (*Berridge v. Ward*, 10 *Eng. C. B. R., N. S.*, 400; and *vide The Queen v. Strand District Board of Works*, 4 *Best & Smith's R.*, 548, 553).

The same doctrine with respect to the conveyance of lands bounded upon a road has been repeatedly recognized by the American courts. In a late case decided by the New York Court of Appeals, it was declared that a deed bounded on a highway *prima facie* carries the title of the grantee to the center of the road, on the assumption that the grantor owns it; but, as was remarked by Porter, J., who delivered the opinion of the court: "The presumption in favor of an adjacent proprietor, and of his successors in interest, is not a *presumptio juris et de jure*, but yields to other evidence displacing the grounds upon which it rests." And the learned judge continued: "The effect, in this respect, of a given deed, depends on the actual state of the title. A conveyance, bounded on a village street, would ordinarily include the soil to the center; but it would be otherwise with a like conveyance bounded on one of the streets in the upper part of the city of

New York, where the right of soil is vested in the public authorities. So, the same language in a deed of lands bounded on a river, which would embrace half the bed of a stream not navigable, would carry the title, in a different case, only to the line of low-water mark. In the present instance, the presumption in favor of the adjacent owners was repelled by affirmative and decisive proof that the fee of the road-bed was not vested in them or in the parties through whom their title was derived." The doctrine of the precise case was held to be, that where the land covered by the road-bed belonged to the government, and not to the owners of adjacent lands, as in the case of the ancient road from Flatbush to Brooklyn, a deed bounding lands upon such highway carries title only to the road-side. So, notwithstanding the general rule, if it appear that the soil of the road was not owned by the grantor, the terms of a deed bounding upon the highway are satisfied by a title extending only to the road-side (*Dunham v. Williams*, 37 *N. Y. R.*, 251, 252).

The present Supreme Court of the State of New York, some years since, held that where the owner of real estate in a village lays out a street through the same, and divides the land on each side of it into village lots, which he sells to individuals in fee, commencing his boundary at a stake in the line of the highway, but not including the highway by express terms, the respective grantees take to the center of the highway; and the doctrine was expressly declared that the grantee of a lot bounded on a street *prima facie* takes to the center of the street; and to prevent the grant having this effect, it was said that there must be language *expressly excluding* the street. It was further declared that, in the city of New York, the legal title to the soil of the streets is vested in the corporation; but that in other parts of the State the legal presumption is that the fee is in the owner of the adjoining lots. And it was observed by Judge Willard, who delivered the opinion of the court, that this presumption in respect to the fee of the land of the roads and streets of the towns and cities of the State, excepting the city of New York, had always been the law as understood and expounded by the courts of the State; and the learned judge referred to a large number of authorities in which the legal presumption was held to obtain in accordance with his statement. It was thought by the court that the boundary of land upon a highway stands upon the same footing at common

law as a boundary upon a stream above tide-water, in which latter case the old Supreme Court of the State had held that, where the grant is so framed as to touch the water of the stream, and the parties do not expressly except the stream, one-half of the bed of the stream is included by construction of law, with the declaration that if the parties mean to exclude it, they should do so by express exception (*Luce v. Carley*, 24 *Wend. R.*, 451, 453). This doctrine Judge Willard indorsed, and said that no case in this State, holding a contrary doctrine, had been brought to the notice of the court (*Adams v. Saratoga and Washington Railroad Company*, 11 *Barb. R.*, 414). The Court of Appeals of the State reversed the judgment of the Supreme Court in this case, and ordered a new trial, on the ground that certain evidence offered on the part of the defendants, which was excluded at the circuit, should have been received. It is understood that the reversal does not affect the authority of the case upon the points herein stated (*Vide Adams v. Saratoga and Washington Railroad Company*, 10 *N. Y. R.*, 328; and *vide Adams v. Rivers*, 11 *Barb. R.*, 390).

The same question came before the present Supreme Court of the State of New York, at a Special Term, in November, 1860; and it was decided, after full argument by very able counsel, that where premises, conveyed by deed, are bounded, in general terms, by a street, the grant extends to the middle of the street; and this, whether the land be situated in the country or in a city. Hogeboom, J., who held the court, remarked that such was conceded to be the rule as to land in the country, and he thought it equally applied to urban territory. The learned judge said: "The reason is substantially the same, as applied to a road in the country or a street in the city; that is, the intervening strip was originally taken, or supposed so to be, for public purposes, from the owners on opposite sides of the street or highway; taken only for public purposes, and only so much of it, both in regard to the quality and duration of the estate, as was supposed to be required for the public use, and is to be returned to the respective proprietors when the public have no further use for it; or else it was founded upon principles of public policy, based upon the supposed inconveniences or impropriety of having so long and narrow a strip of land or body of water the subject of a distinct and separate ownership from that of the adjoining territory on either side" (*The*

People v. Law, 34 Barb. R., 494, 501). This case, although a Special Term decision, was referred to, with approval, in a late case decided by the Court of Appeals of the State, in which it was held, in respect to a quadrangular lot of land on the south-east corner of Bleecker and Grove streets, in the city of New York, that, where the description in a deed defines the boundary of the premises along the line of a given street, title vests in the grantee to the middle of the street, subject, of course, to the public use of the same as a highway; recognizing the rule that, where land is bounded on a street, this includes the land to the middle of the street, unless there is evidence on the part of the grantor to exclude the street from the grant (*Sherman v. McKeon*, 38 N. Y. R., 266). But the same court had previously held that, by force of the statute of 1813, the corporation of the city of New York became seised in fee of the land embraced within the streets; although not absolutely as private or corporate property, but in trust for public use (*The People v. Kerr*, 27 N. Y. R., 188). The fee of the land occupied by the streets of the city of New York being in the corporation, and not in the adjoining owners, of course a deed bounding lands upon one of the streets of that city would not carry title farther than the margin of the street. But the Court of Appeals have held that, as between grantor and grantee, the conveyance of a lot bounded upon a street in a city carries the land to the center of the street. There is no distinction, it was said, in this respect, between the streets of a city and country highways (*Bissell v. The New York Central Railroad Company*, 23 N. Y. R., 61). This is the rule of construction applied to conveyances of land bounded upon the streets of all the cities, with the exception of a portion of the streets, at least, in the city of New York. Doubtless the inference of law upon this subject, in respect to the streets of the city of New York, would be different from that which obtains in other cities. The general doctrine, however, that lands bounded by the highway extend to the center of the road, or, in other words, that the proprietor of lands adjacent to a highway is *prima facie* owner of the soil to the center of the road, has been repeatedly recognized and applied by the courts of the State of New York; and the rule is founded upon the rational presumption that the ground was originally taken from the adjoining owners, and for the sole purpose of being used as a thoroughfare.

The adjudged cases in the neighboring States upon this subject are, for the most part, in harmony with those of the State of New York. At a very early day the courts of Connecticut held that the proprietors of land bounded on a highway have, *prima facie*, at least, a fee in such highway, *ad medium filum vie*, subject to the easement (*Peck v. Smith*, 1 Conn. R., 103; *Chatham v. Brainard*, 11 *ib.*, 60). In the latter case the description in the deed brought the grantee to the highway, and it was held that he took to the center of the highway, although the highway was not mentioned as a boundary. The land conveyed was described as bounded *east* on highway or common land; and it appeared that there was a highway there, and the court held that the words "or common land" did not vary the construction; and in a later case the same court held that, where it is the intention of parties to convey land adjoining a highway so as to exclude the highway, such intention must appear in clear and explicit terms; otherwise the fee passes to the center of the highway. Where it appeared that the south line of the land conveyed was the same as the north line of the highway, although the highway was not mentioned or referred to in the deed, the court held that the fee passed to the center of the highway (*Champlin v. Pendleton*, 13 Conn. R., 23).

In the State of Maine, the Supreme Court has expressly held that a boundary on the highway will carry the grantee to the center of the road. In one case, commissioners, under the direction of the Court of Probate, divided the real estate of a deceased between his heirs, each parcel of which they particularly described. The lands contiguous to the county road were represented as bounded by it, and the court held that the fee of the road, subject to the public easement, was thereby divided; those owning the lots contiguous to it and opposite sides going to the center of the road (*Bucknam v. Bucknam*, 3 Fairf. R., 463). And in a later case the same court held, in general terms, that a grant of land bounded on a highway carries the fee in the highway to the center of it, if the grantor at the time owned to the center, and there are no words showing a contrary intent (*Jackson v. Anderson*, 18 Maine R., 76).

The Supreme Judicial Court of Massachusetts, at an early day, held that land bounded by a river extends to the thread of the stream; but with respect to the boundary of a deed upon a road, a different rule was adopted (*Sweet v. Holland*, 14 Mass. R., 149;

and vide *Sibley v. Howen*, 10 *Pick. R.*, 249; *Tyler v. Hammond*, 11 *ib.*, 193; *Van Olinda v. Lathrop*, 21 *ib.*, 292). In the last mentioned case Morton, J., concedes that there is a great analogy between a boundary upon a river (which he admits goes to the center or thread of the stream) and upon a highway; and yet he says that the cases in that State did not, in the latter case, carry the boundary to the center of the road. These cases are believed to be opposed to the current of authorities in New England. And, indeed, the Supreme Judicial Court of Massachusetts, in all the later cases, has recognized the general doctrine that the owner of land adjoining a highway is presumed to own to the center thereof; and that such is the presumption where a deed bounds the estate by or on a public way, unless a contrary intent appears on the face of the instrument. In accordance with this rule, the court held, in a recent case, where a record in the original Book of Possessions of the town of Boston, which book appears to have been made between 1639 and 1645, of a possession of a house and lot "bounded with the street," that such record shows title in the possessor to the center of the street, even if the possession was granted by the General Court or town after the street had been laid out. Gray, J., delivered the opinion of the court, and said: "In some opinions of this court it has, indeed, been implied or asserted that a boundary upon a road or street passed no title in the land under it. But in the more recent decisions the general rule has been repeatedly declared, and must now be regarded as the settled law of this commonwealth, overruling whatever is irreconcilable in the earlier cases, that a deed bounding land generally by a highway, with no restriction or controlling words, conveys the grantor's title in the land to the middle of the highway (*Newhall v. Ireson*, 8 *Cush.*, 598; *Phillips v. Bowers*, 7 *Gray*, 24-26; *Fisher v. Smith*, 9 *Gray*, 444; *Hollenbeck v. Rowley*, 8 *Allen*, 473). And in *Rice v. Worcester* (11 *Gray*, 283, *note*) it was held that the title of the owner of land abutting on a highway must be presumed to extend to the center of the highway, although the way was so ancient that its origin was unknown. These decisions are in accordance with the law as established in other States and in Great Britain. * * * The question whether any grant extends to the side line or the center line of the highway is, doubtless, according to the statement made by Chief Justice Shaw, in *Webber v. Eastern Railroad* (2 *Met.*, 151),

and approved by the court in *Codman v. Evans* (1 *Allen*, 446), ‘a question of construction in each particular case, and depends, as in all other cases, upon the intent of the parties, as expressed in the descriptive parts of the deed, explained and illustrated by all the other parts of the conveyance, and by the localities and subject-matter to which it applies.’ The owner of land by the side of the highway, and under it to the center thereof, may, of course, by using apt words, limit his grant to the edge of the highway, and retain his title in the fee of the soil over which the highway runs. * * * But in the absence of words clearly manifesting an intent so to do, the law presumes that he did not intend to reserve the title in a strip of land not capable of any substantial or beneficial use by him, after having parted with the land by the side of it, while the highway remains, nor, ordinarily, of any considerable value to him if the way should be discontinued, and the ownership of which by him might greatly embarrass the use or disposal, by his grantee, of the lot granted” (*City of Boston v. Richardson*, 13 *Allen’s R.*, 146, 152, 153). And in a very recent case, before the Supreme Judicial Court of Massachusetts, the general doctrine was again confirmed. It appeared that A. conveyed to W. a lot of land, “situate on the northerly side” of a certain street, and “bounded and described as follows: Beginning at a point on the line of land of B.; thence by said street north, fifty-eight and three-quarters degrees west, about one hundred feet, to a stake and stones at the corner of land of G.; thence north, thirty-one and a quarter degrees east, to the river; thence by said B.’s land to the first mentioned bound.” The court held that the fee of the land to the center of the street passed to W., it appearing that A. was seised thereof at the time of this conveyance (*White v. Godfrey*, 97 *Mass. R.*, 472). And in one of the cases before the same court, hereinbefore referred to, it was held that the title of the owner of land abutting on a highway must be presumed to extend to the center of the highway, although the way was so ancient that its origin was unknown (*Rice v. Worcester*, 11 *Gray’s R.*, 283; and *vide Marsh v. Burt*, 34 *Vt. R.*, 289). The Supreme Court of the United States have expressly recognized the general doctrine upon the subject, and especially in a case decided in December, 1864, in which Chief Justice Chase, who delivered the opinion, said: “It is a familiar principle of that law” (the law applicable to dedications) “that a

grant of land, bordering on a road or river, carries the title to the center of the river or road, unless the terms or circumstances of the grant indicate a limitation of its extent by the exterior lines" (*Banks v. Ogden*, 2 Wall. R., 57, 68). In respect to the doctrine which is applied to lands bounded upon roads, and to analogous cases, Chancellor Kent says: "It may be considered as the general rule that a grant of land bounded upon a highway or river carries the fee in the highway or river to the center of it, provided the grantor, at the time, owned to the center, and there be no words or specific description to show a contrary intent" (3 *Kent's Com.*, 433, 434).

It should be said that, where a highway passes through an inclosed country, not the formed road merely, whether of pavement, gravel or other material, but the whole space from fence to fence is the highway; and where a highway passes over a common, it frequently extends considerably to the right and left of what may be the ordinary passage; but the fences themselves are not comprehended in the legal acceptation of a highway. These principles have been settled by the courts in England (*Vide Elwood v. Bullock*, 6 *Queen's Bench R.*, 383, 409; *Rex v. Wright*, 3 *Barn. & Ad. R.*, 681; *Regina v. United Kingdom Telegraph Company, L. J., M. C.* 166; *S. C.*, 3 *Fos. & Fin. R.*, 73). But the width of the road depends upon the provisions of the statute under which it was laid out, unless the same has become a public highway by dedication and use. For example, by the statutes of New York, public roads are required to be not less than three rods in width, and the presumption, doubtless, would therefore be, that the road was of the width prescribed by law. If it should be claimed that the road was of a different width, by prescription or otherwise, it would lay upon the party who set up the claim to prove it (*Vide Cleveland v. Cleveland*, 12 *Wend. R.*, 172). When the road has become a public highway by being laid out and opened by the public authorities, the width and location of the same depend upon the provisions of the order laying it out. But where it becomes so by dedication and user, the location and width of it depend upon the fact of travel and actual use. The right acquired by the public where land is appropriated, by dedication, to the purpose of a highway, is the same as where the road is made a public highway by action of the public authorities. In either case, the public acquires only the right of way, which is a

mere easement. The fee remains in those who made the dedication, and the rule of boundary upon one is the same as the other (*Knox v. The Mayor, etc., of New York*, 55 *Barb. R.*, 404; *S. C.*, 38 *How. Pr. R.*, 67).

The same principles which apply to boundaries on a public road apply also to those on a private road. That is to say, the presumption that the soil of a road *usque ad medium filum viæ* belongs to the owners of the adjoining lands, applies equally to a private as to a public road. Said Williams, J., in a late case before the English Court of Common Pleas: "Now, as to the proposition that the presumption which is established in the case of a public road prevails also in the case of a private road, I think that is not inaccurate, provided the proposition is confined to the simple case of a private road bare of all other circumstances. If nothing else appears than the existence of a private way running between the lands of two adjoining proprietors, I do not quarrel with the proposition; for, there being nothing else to guide them to a conclusion, I think the jury may very well presume that the soil of the road belongs half to the one and half to the other. That, like all other presumptions, may be rebutted by evidence of acts of ownership." The learned judge who tried the cause at *nisi prius* told the jury that there was a presumption, in the case of a private way or occupation road between two proprietors, that the soil of the road belongs *usque ad medium filum viæ* to the owners of the adjoining property on either side. In respect to this instruction, Cockburn, Ch. J., observed: "That proposition, subject to the qualification which I shall presently mention, and which, I take it, was necessarily involved in what afterward fell from the learned judge, is in my opinion a correct one. The same principle which applies in the case of a public road, and which is the foundation of the doctrine, seems to me to apply with equal force to the case of a private road. That presumption is allowed to prevail upon grounds of public convenience, and to prevent disputes as to the precise boundaries of property; and it is based upon this supposition,—which may be more or less founded in fact, but which at all events has been adopted,—that, when the road was originally formed, the proprietor on either side each contributed a portion of his land for the purpose. I think that is an equally convenient and reasonable principle, whether applied to a public or to a private road; but, in the latter

case, it must of course be taken with this qualification, that the user of it has been quâ road and not in the exercise of a claim of ownership." Crowder, J., also gave an opinion concurring in the proposition of law, that the rule as to the soil being presumptively vested in the respective owners of the adjoining lands *usque ad medium filum viæ*, was the same in the case of a private road as in that of a public road (*Holmes v. Bellingham*, 7 *Com. Bench R.*, N. S., 328, 336-339; *S. C.*, 97 *Eng. C. L. R.*, 327, 335-338). And in a subsequent case the same court held that the mere fact that a private road leads to the lands of one only of two adjoining proprietors will not be sufficient to rebut the presumption of law that each proprietor owns the soil to the center of the road, for it is *per se* no evidence of the soil of the road being vested in the proprietor to whose land it leads (*Smith v. Howden*, 14 *Com. Bench R.*, N. S., 398).

The same doctrine is generally held to obtain by the American courts. The Supreme Judicial Court of Massachusetts in one case held that a deed of land "bounded on" a private way leading over other land of the grantor to his own dwelling-house passed the fee in the land under the way to its center. The court said: "The rule is well settled in this commonwealth, that a deed of land bounded on a highway laid out over land of the grantor passes the fee to the center of the way, when there is nothing in the deed to require the opposite construction. A majority of the court are of the opinion that the same rule extends to private ways" (*Fisher v. Smith*, 9 *Gray's R.*, 441, 444). And the same learned court has approved the principle in subsequent cases (*Vide City of Boston v. Richardson*, 13 *Allen's R.*, 146, 154; *Jamaica Pond Aqueduct*, 9 *ib.*, 159; *Winslow v. King*, 14 *Gray's R.*, 320). The Supreme Court of the State of Maine, however, has held in one case, that where the proprietor of land grants the right of a private way across it, of a specified direction and width, and afterward conveys the land on one side of such way, bounding it by the line of the way, the grantor of such land takes no fee in any part of the strip of land covered by the right of way, and further, that by virtue of his deed, the grantee takes in such strip no easement, or right of way by necessity (*The State v. Clements*, 32 *Maine R.*, 279). But this is contrary, certainly, to the English and Massachusetts decisions; and the better opinion is that the presumption that the owner of land by the side of a way owns

the fee to the middle, should be applied equally to public and private ways. There can be no good reason why the rule should be applied to a public, and not to a private way. So that it may be affirmed as a rule of law that the presumption in all cases is, that the soil of a public or private way belongs in equal moieties to the owners of the land on either side. It is a rule introduced for convenience, that there may not be perpetual disputes about trifles, and it is as pertinent in the case of a private as a public way.

Where waste lands adjoin a public highway, the presumption of law is that such waste lands and the soil of the highway itself *ad medium filum viæ* belong to the adjoining owners; but so far as waste lands are concerned, the doctrine is of comparatively little importance in this country, and in England the rule prevails only between the lord and the copyholders and tenants of a manor, or between the grantor and the grantee of an estate. It has no application to the case of persons who claim under the same grantor. And where the lord of a manor had conveyed land to A. and afterward other land to B., and it appeared that a narrow strip of land passed by one or other of the conveyances, but it was doubtful by which, the court held that no presumption arose in favor of A., from the fact that the strip of ground lay between a highway and land which was indisputably comprised in A.'s conveyance (*White v. Hill*, 6 *Queen's Bench R.*, 487; and *vide Marquis of Salisbury v. Great Northern Railway Company*, 5 *Com. Bench R.*, N. S., 174).

The presumption referred to may be rebutted by evidence showing that the ownership of the highway and waste lands is in the lord of the manor, or some other proprietor. Said, Tindal, Ch. J.: "The point to be ascertained is, whether the grantee of the lord inclosed to the edge of his grant, or left an interval between his inclosure and the boundary line of his property. If he inclosed less than the whole extent of his grant, and left an interval, the spot in dispute belongs to the copyholder; if he inclosed to the extent of his grant, the interval in question belongs to the lord. The legal presumption is in favor of the grantees of the adjoining land, and where the lord claims the interval, he is obliged to show acts of ownership in support of his claim" (*Doe v. Kemp*, 7 *Bing. R.*, 335). Acts of ownership, exercised not only over the spot in dispute but over other parts of the waste lands of the manor, are receiveable in evidence in support of the lord's rights, if the parts

in dispute and the parts over which the acts of ownership have been exercised are so situated that they may fairly be considered as parts of one waste or common (*Vide Doe v. Hampson*, 4 *Com. Bench R.*, 267; *Tyrrwhitt v. Wynne*, 2 *Barn. & Ad. R.*, 554; *Hollis v. Goldfinch*, 1 *Barn. & Cres. R.*, 205; *Wild v. Holt*, 9 *Mees. & Welsb. R.*, 672; *Taylor v. Parry*, 1 *Manning & Granger's R.*, 605). But where it is uncertain whether an ancient grant included a piece of waste land between the fence and the road, the English Court of Common Pleas held that evidence of user by the grantee and those claiming under him will be allowed to outweigh the presumption in favor of the lord, arising from acts of ownership by him on other parts of the wastes of the manor similarly situated (*Simpson v. Dendy*, 8 *Com. Bench R.*, *N. S.*, 433).

The origin of these strips of waste land between highroads and inclosures, and the presumption of law as to their being part of the adjoining property, is thus stated by Lord Chief Justice Abbott: "In remote and ancient times, when roads were frequently made through uninclosed lands, and they were not formed with that exactness which the exigencies of society now require, it was part of the law that the public, where the road was out of repair, might pass along the land by the side of the road. This right on the part of the public was attended with this consequence, that although the parishioners were bound to the repair of the road, yet, if an owner excluded the public from using the adjoining land, he cast upon himself the *onus* of repairing the road. If the same person was the owner of the land on both sides, and inclosed both sides, he was bound to repair the whole of the road; if he inclosed on one side only, the other being left open, he was bound to repair to the middle of the road; and where there was an ancient inclosure on one side, and the owner of lands inclosed on the other, he was bound to repair the whole. Hence it followed, as a natural consequence, that when a person inclosed his land from the road he did not make his fence close to the road, but left an open space at the side of the road, to be used by the public when occasion required. This appears to be the most natural and satisfactory mode of explaining the frequency of wastes left at the sides of the roads; the object was to leave a sufficiency of land by the side of a road when it was out of repair" (*Steel v. Pickett*, 2 *Starkie's R.*, 469).

Balks are strips of land lying between the lands of private proprietors, and are commonly used for turning the plough. Until recently it was supposed that there was no presumption of law that these strips of land belong to the owners on either side. This was so declared by Taunton, J., in one case before the English courts (*Godmanchester v. Phillips*, 4 *Adolph. & Ellis R.*, 560). But the English Court of Common Pleas has recently held that the ordinary presumption is that strips of land lying along a highway, even though indirectly connected with parts of the waste, belong to the owner of the adjacent inclosed land, between which and the actual beaten road they lie, and not to the lord of the manor, especially if the adjacent owner has done acts of ownership without interruption upon the land. It was said that such strips of land might well pass under a conveyance of the adjacent inclosure, though the deed purported to state the quantity of acres, within the fences, that were therein passed, if it had the words "more or less" added (*Dendy v. Simpson*, 10 *J. Scott's R.*, N. S., 883; *S. C.*, 100 *Eng. C. L. R.*, 883). By the civil law a vacant space, called *methoria* or *limitare iter*, was ordered to be left between the boundaries of adjoining proprietors. The property in those vacant spaces was in the public; consequently they could not be made the subject of commerce, and were incapable of becoming the property of private individuals (*Vide Colquhoun's Summary*, § 2179).

The law is well settled, both in this country and in England, that, if a person—who incloses his land up to a highway, so as to deprive the public of their right of traveling on the adjoining strips of waste land where the road itself is not fit for use—neglects to keep the road in repair, passengers may make gaps in the hedges and trespass on his property, so long as they do not ride farther into it than is needful for avoiding the bad way (*Heron's Case*, *Sir W. Jones*, 297; *Duncombe's Case*, 1 *Rolle's Abr.*, 390). In a case before the present Supreme Court of the State of New York it was held that a person traveling on a public highway, which has become foundrous and impassable, has a right to remove enough of the fences in the adjoining close to enable him to pass around the obstructions, doing no unnecessary injury; but that he becomes a trespasser if he tears away other fences, and tramples down the herbage in other parts of the close (*Williams v. Safford*, 7 *Barb. R.*, 309).

But the grantee of a *private* way, which has become foundrous and impassable, cannot, without being a trespasser, go in the adjoining close, and thus pass around the obstruction. There are some cases which give countenance to the opinion that the rule, in this respect, is the same in the case of a private as of a public way. This opinion was intimated by Blackstone in his Commentaries, edition of 1765, and by Chief Baron Comyn in his Digest, title Chemin, D. 6. But the authorities cited in support of the opinion do not warrant it; for they all seem to relate to *public* ways only (1 *Saunders*, 322, *a*, note 3). The principle, however, does not apply in the case of a private road, because the person using the way ought himself to keep it in repair, and because the grantor of the way gives the grantee a right only over a particular line of road, and gives him no liberty to break out of it over the whole surface of his close. This has been held in an early case in England, with respect to private ways rendered impassable by the overflow of a river (*Taylor v. Whitehead*, 2 *Doug. R.*, 749). And the same principle was again asserted in a later English case, in which Lord Ellenborough remarks that the plaintiff has no right to break out of the road and go at random over the whole surface of the close (*Bullard v. Harrison*, 4 *Maule & Selwyn's R.*, 387, 392). The same principle, in respect to private ways, has been recognized, also, by the courts of this country (*Vide Holmes v. Seeley*, 19 *Wend. R.*, 507; *Williams v. Safford*, 7 *Barb. R.*, 309).

Independent of any statutory enactment, where two proprietors are separated by a ditch or a wall, and the owner on one side conveys his land bounding the grantee on the ditch or wall, the grant is presumed, till the contrary is shown, to extend to the center of the ditch or wall, the same as in the case of land conveyed, bounded on an unnavigable river or highway. In a case decided by the Supreme Court of Connecticut it appeared that a party, having made a ditch six feet wide through his land, conveyed a part of it, bounding the grantee on the ditch; and the court held that the grant extended to the middle of the ditch (*Warner v. Southworth*, 6 *Conn. R.*, 471).

The property in a party wall, erected at the joint expense of two proprietors, insures the property of the land on which it stands where the quantity of land contributed by each party is known. There is no transfer of property, but the parties are severally owners of their respective lands as before; and each, for

any injury to the portion of the wall standing on his own soil, has the ordinary remedy (*Matts v. Hawkins*, 5 *Taunton's R.*, 20). So the presumption, in case of boundary on party walls, is that the wall and the land upon which it stands belong in common to the owners of the adjoining premises (*Cubitt v. Porter*, 8 *Barn. & Cres. R.*, 257). And where a party conveys land, bounding it in the conveyance upon a wall, the presumption is that the grantee takes to the center of the wall (*City of Boston v. Richardson*, 13 *Allen's R.*, 146, 155).

CHAPTER X.

RULES FOR THE CONSTRUCTION OF GRANTS IN RESPECT TO BOUNDARY —
PRINCIPLES GOVERNING THE DESCRIPTIVE LANGUAGE OF DEEDS OF
REAL ESTATE — THE AIDS WHICH MAY BE RESORTED TO IN THE CON-
STRUCTION OF CONVEYANCES OF LAND.

THERE are some general rules given for the construction of grants of real property which are important to understand. In a late and well-considered case before the Supreme Judicial Court of Massachusetts, the general rule of construction of conveyances of land were thus stated: "Whenever land is described as bounded by other land, or by a building or structure, the name of which, according to its legal and ordinary meaning, includes the title in the land of which it has been made a part, as a house, a wall, a wharf or the like, the side of the land or structure referred to as a boundary is the limit of the grant; but where the boundary line is simply by an object, whether natural or artificial, the name of which is used in ordinary speech as defining a boundary, and not as describing a title in fee, and which does not in its description or nature include the earth as far down as the grantor owns, and yet which has width, as in the case of a way, a river, a ditch, a wall, a fence, a tree or a stake, the center of the thing so running over or standing on the land is the line of boundary of the lot granted" (*City of Boston v. Richardson*, 13 *Allen's R.*, 144, 157). This statement presents the general doctrine with terseness and point, and it is well sustained by the authorities.

Another rule upon the subject is that words in an instrument of grant, as elsewhere, are to be taken in the sense which the com-

mon usage of mankind has applied to them. If lands granted are described as bounded by a house, no one can suppose the house included in the grant; but if the land granted is described as bounded by a highway, it would be equally absurd to suppose that the grantor has reserved to himself the right to the soil *ad medium filum*, in the far greater majority of cases wholly unprofitable. This last is the illustration given by Coleridge, J., in an important English case; and it is in accordance with judicial opinions (*Lord v. The Commissioners of Sidney*, 12 *Moore P. C. C.*, 473, 497; *vide, also, In re Belfast Dock Act*, 1 *Irish Eq. R.*, 128, 140; 2 *Washburn on Real Property*, 638).

Again, in construing conveyances of land, effect is to be given to every part of the description, if practicable; but, if the thing intended to be granted appears clearly and satisfactorily from any part of the description, and other circumstances of description are mentioned which are not applicable to that thing, the grant will not be defeated; but those circumstances will be rejected as false or mistaken (*Jackson v. Clark*, 7 *Johns. R.*, 217; *Jackson v. Loomis*, 18 *ib.*, 81; *Emerson v. White*, 9 *Foster's R.*, 482). And what is *most material* and *most certain* in a description shall prevail over that which is *less material* and *less certain*. Thus, course and distance shall yield to natural and ascertained objects; as a river, a stream, a spring or a marked tree. Indeed, it seems to be a universal rule that course and distance must yield to natural, visible and ascertained objects (*Newton v. Prior*, 7 *Wheat. R.*, 10; *Preston v. Bowman*, 6 *ib.*, 582; *Patten v. Stitt*, 6 *Rob. R.*, 631; *Jackson v. Camp*, 1 *Cow. R.*, 605; *Doe v. Thompson*, 5 *ib.*, 371; *Jackson v. Moore*, 6 *ib.*, 706). And a false or mistaken particular in a conveyance may be rejected, when there are definite and certain particulars sufficient to locate the grant. But, *prima facie*, a fixed, visible monument can never be rejected as false or mistaken in favor of mere course and distance, as the starting point, when there is nothing else in the terms of the grant to control and override the fixed and visible call. The general rule that courses and distances must yield to natural or artificial monuments or objects is upon the legal presumption that all grants and conveyances are made with reference to an actual view of the premises by the parties thereto (*Raynor v. Timerson*, 46 *Barb. R.*, 518; *vide Harvey v. Mitchell*, 11 *Foster's R.*, 575 *Smith v. Chatham*, 14 *Tex. R.*, 322). Whenever, in the descrip-

tion of land conveyed by deed, known monuments are referred to as boundaries, they must govern, although neither courses nor distances nor the computed contents correspond with such boundaries. This has long been regarded as one of the fundamental rules in the construction of deeds. It is not, however, inflexible; but, like other rules of law, it must sometimes yield to exceptions. Said the court, in one case, the only reason given, or which can be given, why monuments are to control the courses and distances in a deed is that the former are less liable to mistakes (*Davis v. Rainsford*, 17 *Mass. R.*, 210). The reason elsewhere assigned for the rule is, that parties are presumed to have contracted with reference to an actual view of the premises. But this presumption of law, that, in the conveyance of real estate, the parties contract with reference to the visible physical condition of the property at the time, may be repelled by actual knowledge, on the part of the contracting parties, of facts which negative any deduction to be drawn from the apparent condition. Upon proof of such knowledge, they are presumed to have contracted not solely with reference to the condition of the property, as it would have been presented to a stranger, but as it was known to be by the parties (*Simmons v. Cloonan*, 47 *N. Y. R.*, 3; and *vide Curtiss v. Ayrault*, *ib.*, 73). And where the grammatical sense of words is not in harmony with the obvious intention of the parties, the courts do not hesitate to substitute one word for another, for the purpose of giving effect to such intention. A grammatical construction must never be allowed to interfere with the intention of an instrument (*The Long Island Railroad Company v. Conklin*, 32 *Barb. R.*, 381; *Hancock v. Wilson*, 18 *Cal. R.*, 137). But punctuation will be resorted to to settle the meaning of an instrument after all other means fail; although punctuation is a most fallible standard to interpret a writing, and should not be resorted to until all other means fail. The court will first take the instrument by its four corners, in order to ascertain its true meaning; and if that is apparent on judicially inspecting it the punctuation will not be suffered to change it (*Erving v. Burnet*, 11 *Peters' R.*, 41). Again, a grant is to be taken most strongly against the grantor; and where a deed may inure in different ways, the grantee is entitled to his election which way to take it (*Patten v. Stitt*, 6 *Rob. R.*, 431; *Middleton v. Pritchard*, 1 *Scam. R.*, 510; *Coheco Co. v. Whittier*, 10 *N. H. R.*, 305; *Dunn v. English*, 3 *Zabr. R.*, 126).

Again, it is a cardinal rule in the construction of conveyances of land, as well as of contracts, that the intention of the parties is to be inquired into, and, if not forbidden by law, is to be effectuated. And a deed will always be expounded so as to give effect to the intent of the parties (*Jackson v. Beach*, 1 *Johns. Cases*, 399; *Jackson v. Myers*, 3 *Johns. R.*, 388). The object of construction is to ascertain the intent of the parties, and when this intent is discovered it governs, unless the language employed renders it impossible to give it effect (*Wolfe v. Scarborough*, 2 *Ohio R.*, *N. S.*, 361). And in the construction of deeds, the cardinal rule is to arrive, if possible, at the true intent and meaning of the grantor, from a fair consideration of the whole instrument, and then to give effect to that intention, if it can be done without violating any rule of law; and if the instrument bears upon its face evidence that it was written by a person unskilled in legal technicalities, a much greater latitude of construction is indulged than when it is formal and technical, and appears to have been drawn by a skillful draftsman (*Hamner v. Smith*, 22 *Ala. R.*, 433). But the intention of the parties to a deed is to be accomplished, unless there are expressions in the conveyance which positively forbid it (*Peyton v. Ayres*, 2 *Md. Ch. R.*, 64). The intent, where apparent and not repugnant to any rule of law, will control technical terms; for the intent, not the words, is the essence of every agreement. In the exposition of deeds, the construction must be upon the view and comparison of the whole instrument, and with a view to give every part of it meaning and effect (*Calkins v. Lavelle*, 44 *Vt. R.*, 230). The rule of construction is well settled, that every word in the instrument is to have its effect, if an effect can be given to it not inconsistent with the general intent of the whole instrument, when taken together, and no word is to be rejected unless there cannot be a rational construction given to the instrument with the words as they are found (*Churchill v. Reamer*, 8 *Bush's R.*, 256). Too much regard is not to be had to the proper and exact signification of words and sentences, so as to prevent the simple intention of the parties from taking effect. And whenever the language used is susceptible of more than one interpretation, the courts will look at the surrounding circumstances existing when the contract was entered into, the situation of the parties, and of the subject-matter of the instrument. To this extent, at least, the well-settled rule is, that extraneous evidence

is admissible to aid in the construction of written contracts (*Wilson v. Troup*, 2 Cow. R., 195, 228; *Parkhurst v. Smith*, Willes. R., 332; *Bradley v. The Washington, Alex. and Geo. S. P. Co.*, 13 Peters' R., 89; *Gibson v. Tyson*, 5 Watts R., 34). A deed must, however, receive its legal construction according to its language and subject-matter (*Jackson v. Tibbitts*, 9 Cow. R., 241; and *vide Gibson v. Bogy*, 28 Mo. R., 478). But where a description is employed in a deed, which has not, by statute, usage or judicial decision, acquired a fixed legal construction, or a boundary is referred to which is fluctuating and variable, other means must be resorted to in order to ascertain the meaning and construction of the deed. For example, the word "pond" used in a deed as a description is indefinite. It may mean a natural pond, or an artificial pond raised for mill purposes, either permanent or temporary, and in both cases the limits of such body of water may vary at different times and seasons, by use, or by natural causes, and where the one or the other is adopted as a descriptive limit or boundary, a different rule of construction may apply. A large natural pond may have a definite low-water line, and then it would seem to be the most natural construction, and one which would be most likely to carry into effect the intent of the parties, doubtless, to hold that land bounded upon such a pond would extend to low-water line, it being presumed that it is intended to give to the grantee the benefit of the water, whatever it may be, which he could not have upon any other construction. And where an artificial pond is raised, by a dam swelling a stream over its banks, it would be natural to presume that a grant of land bounded upon such a pond would extend to the thread of the stream upon which it is raised, unless the pond had been so long kept up as to become permanent, and to have acquired another well-defined boundary. So where such an object is used as a boundary in a deed, according to a well-established rule of evidence, it is competent to resort to parol proof, showing all the circumstances from which a legal inference can be drawn that one or other line was intended by the ambiguous description used in the deed. The court may be aided in giving construction to the deed by resorting to means outside of the conveyance itself.

Usage cannot be admitted to vary or contradict a deed. But if the words of the deed are of uncertain meaning, usage is proper to explain them. Deeds are to be expounded by their terms where

there is no ambiguity, and neither parol evidence nor usage can be admitted to vary or contradict a written instrument. But if the words used in a deed are equivocal, evidence of usage ought to be admitted as the best expositor of the intention of the parties. Of course, if the words are clear and precise, leaving no doubt of the intention of the parties, usage will not aid in the exposition, and ought not to be admitted (*Vide Livingston v. Tenbroeck*, 16 *Johns. R.*, 23; *Parsons v. Miller*, 15 *Wend. R.*, 561). After ascertaining the existing state of things at the time of its execution, the deed must be left to speak for itself (*Swick v. Sears*, 1 *Hill's R.*, 17). And the construction ought to be made on the entire deed, not on any particular part of it; and such construction should be given that, if possible, every part of the deed may be operative. If a deed, however, cannot operate in the manner intended by the parties, such a construction should be given, that it may operate in some other manner (*Jackson v. Blodgett*, 16 *Johns. R.*, 172). If a general clause be followed by special words, which accord with the general clause, the rule is, that the deed shall be construed according to the special matter (*Munro v. Allaire*, 2 *Cain's R.*, 320). But when parts of a particular description of land are repugnant, a general description following may be resorted to, and of the conflicting parts of the particular description, that is to be rejected which does not concur with the general description (*Peaslee v. Gee*, 19 *N. H. R.*, 273). Where subsequent words in a deed are of doubtful import, they will not be so construed as to contradict preceding words which are certain. Indeed, as has been before affirmed, in the construction of deeds, if there are two clauses which are inconsistent with each other, the last must give way to the first (*Petty v. Boothe*, 19 *Ala. R.*, 633; *Tubbs v. Gatewood*, 26 *Ark. R.*, 128). But, if the first part of the description in a deed is complete in itself, but further matter of description is added which modifies or controls what precedes it, the latter part is not to be rejected as repugnant; but the whole language of the deed is to be construed together, if it may be, in order to ascertain the true construction. But where all other means of ascertaining the true construction of a deed fail, and a doubt still remains, that construction must prevail which is the most favorable to the grantee (*Clough v. Bowman*, 15 *N. H. R.*, 504; and *vide Mills v. Catlin*, 22 *Vt. R.*, 98; *Foy v. Neal*, 2 *Strobh. R.*, 156). And a construction which requires

that an entire clause of a deed should be rejected, will be adopted only from unavoidable necessity (*City of Alton v. Illinois Transportation Company*, 12 *Ill. R.*, 38). And it is another rule of construction, that where the words of a grant are ambiguous, the courts will call in aid the acts done under it, as a clue to the intention of the parties. Said Lord Ellenborough, Ch. J., in giving his opinion in a case before the English Court of King's Bench: "However formal the words of the ancient deeds may be, they are to be construed, as Lord Coke says, by evidence of the manner in which the thing has been always possessed and used" (*Weld v. Hornby*, 7 *East R.*, 195; and *vide Doe v. Rice*, 8 *Bing. R.*, 181; *Winnipisseogee, etc., Co. v. Perley*, 46 *N. H. R.*, 83; *Livingston v. Ten Broeck*, 16 *Johns. R.*, 22). Where a deed does not contain any certain description, but there is a description by circumstances, and all the circumstances may be essential to distinguish the lands intended to be granted, the law requires all the circumstances to be proved, and will not suffer any lands to pass except those that fall within the terms of the deed (*Bell v. Woodward*, 46 *N. H. R.*, 315). And it is well settled that, in the construction of a deed, it is competent for the court to inquire into the intent of the parties; and in determining such intent, when necessary, to look at their acts under the deed (*Mulford v. Le Franc*, 26 *Cal. R.*, 88). Particularly when a deed, conveying land, is of doubtful construction as to the boundaries, the construction given by the parties themselves, as shown by their acts and admissions, is deemed to be the true one, unless the contrary be clearly shown (*Stone v. Clark*, 1 *Met. R.*, 378). And where the construction of a deed, as to the boundaries, is doubtful, the occupation of the land by the grantee to what he supposed to be the dividing line between his own land and that adjoining, without objection from such adjoining proprietor, has been held to be presumptive evidence of the true place of the line (*French v. Pearce*, 8 *Conn. R.*, 439). As a general rule, however, deeds must interpret themselves without reference to the acts of the parties. Their acts themselves do not aid the construction, nor is a party bound by his own construction (*Hutchins v. Dixon*, 11 *Md. R.*, 29).

Another well-settled rule in the construction of deeds is that, where certain monuments are referred to in a description, which do not exist at the time, and afterward the parties, in good faith

and by mutual agreement, put up monuments as and for those intended in the description, such monuments will be deemed the monuments intended in the description. And this placing of monuments and the consent and agreement of the parties in relation thereto may be proved by parol. This is suggested by Shaw, Ch. J., in a case in the Supreme Judicial Court of Massachusetts, to illustrate the rule referred to (*Waterman v. Johnson*, 13 *Pick. R.*, 261, 267; and *vide Makepeace v. Bancroft*, 12 *Mass. R.*, 469). The question whether any grant extends to the side line or the center line of a highway or water-course is, doubtless, according to the statement made by Chief Justice Shaw, in *Webber v. Eastern Railroad* (2 *Metcalf*, 151), and approved by the Supreme Judicial Court of Massachusetts in *Codman v. Evans* (1 *Allen*, 446), “a question of construction in each particular case, and depends, as in all cases, upon the intent of the parties, as expressed in the descriptive parts of the conveyance, and by the localities and subject-matter to which it applies.” The owner of land by the side of a highway, and under it to the center thereof, may, of course, by using apt words, limit his grant to the edge of the road, and retain his title in the fee of the soil over which the highway runs. But in the absence of words clearly manifesting an intent so to do, the law presumes, as was argued in a case heretofore referred to, that he did not intend to reserve the title in a strip of land not capable of any substantial or beneficial use by him, after having parted with the land by the side of it, while the highway remains, nor, ordinarily, of any considerable value to him if the way should be discontinued, and the ownership of which by him might greatly embarrass the use or disposal, by his grantee, of the lot granted. Hence, where general terms are used in the description in a deed, the court will construe such general terms in accordance with the rule definitely established; and, accordingly, if the conveyance bounds the land upon a highway or water-course, in general terms, the premises conveyed are presumptively extended by legal operation to the center of the highway, or the thread of the water-course or unnavigable river. This is in accordance with well-settled authority. The owner of land on each side of a road, or stream of water not navigable, is, *prima facie*, presumed to own to the center, subject to the public right of way. This has been shown in a previous chapter; and, in the construction of deeds, the general rule in this regard is that, where a deed

or grant of land is bounded *on* a highway, or runs *along* a highway, or where the boundary line runs to a highway, it conveys the land to the center of the road, unless there be decided and controlling words or specific description, to show the contrary intent. Where the boundary given in a deed has physical extent, as a road, lane, street, fence, creek or unnavigable river, the grantee presumptively takes to the center of the object so given. This is the general rule or principle of construction applied to conveyances (*Jackson v. Hathaway*, 15 *Johns. R.*, 447). The decisions have carried the doctrine so far as to hold that a description which runs to the *bank* of a creek, and thence *along the bank* of such creek, carries the grant to the center of the creek. But where the description is *expressly limited to the bank*, or where it runs *along the side* of a road, the grant is held to be restricted, and not to include the land to the center of the road or of the stream. No principles appear to be better settled than these, especially as applicable to country lands; and the Superior Court of the city of New York decided, years ago, that the rule of construction as to the extent to which a grant of land, bounded on a road or creek, carries the rights of the grantee, in respect of the adjacent ground within the road or the creek, applies equally to city lots and to farms in the country (*Hammond v. McLachlan*, 1 *Sand. R.*, 323). And the same *general* doctrine has been recognized by the New York Court of Appeals in a case in which the doctrine of the Superior Court was referred to and impliedly approved (*Sherman v. McKeon*, 38 *N. Y. R.*, 266, 271). And the Supreme Court of Minnesota has recently declared that it is a rule of public policy, not to be departed from unless the intention of the parties to the contrary is expressed in the most unmistakable language, that a deed of a lot bounded by a street conveys the fee to the center of the street (*Mankato v. Willard*, 13 *Minn. R.*, 13). And to the same effect is the doctrine of a late case decided by the Supreme Judicial Court of Massachusetts, in which it was held that a deed bounding land generally by a highway, with no restrictive or controlling words, conveys the grantor's title in the land to the middle of the highway (*Boston v. Richardson*, 13 *Allen's R.*, 146; and *vide Glasby v. Morris*, 3 *Green's N. J. R.*, 72). Reference may also be made to a late case decided by the Supreme Court of Wisconsin, in which it was said that, if a highway or river is named in a deed as a boundary

of land conveyed, the center of such highway or river is to be understood, unless there are express words limiting the boundary to the bank of the river or the side of the highway; and where there is a known and well ascertained place of beginning in the description in a deed, that must govern, and the grant must be confined within the boundaries given (*Gove v. White*, 20 *Wis. R.*, 425). It has been held by the Supreme Court of Vermont that if the language of a deed, describing land conveyed bounded upon a highway, leaves it doubtful whether the grantor intended the line to be in the center or on the side of the highway, the boundary will be construed to be the center of the road. And the doctrine was in terms laid down, that where land is bounded "upon," "on" or "along" a highway, the presumption is that the line extends to the middle of the highway (*Marsh v. Burt*, 34 *Vt. R.*, 289). And the courts of New York hold to the doctrine, that a conveyance bounding premises generally on a street, or highway, or stream of water not navigable, carries the fee to the center of the street or stream (*People v. Law*, 34 *Barb. R.*, 494; *Wetmore v. Law*, *Ib.*, 515; *Dunham v. Williams*, 36 *ib.*, 136; *Seneca v. Knight*, 23 *N. Y. R.*, 498). Indeed, it has been held by high authority that where land is sold bordering on a highway, the mere fact that it is not so described in the deed will not vary the construction. The grantee takes the fee to the middle of the highway, on the line of which the land is situated (*Gear v. Barnum*, 37 *Conn. R.*, 229; *Stark v. Coffin*, 105 *Mass. R.*, 328; *Hawesville v. Lander*, 8 *Bush's R.*, 679). But this doctrine, perhaps, has but little to do with the construction to be given to a grant or conveyance. It is not a rule for settling the true construction of a deed. When a man presents his deed, ordinarily the law makes no presumption concerning his title; he holds by force of his grant; he goes to the limit which that prescribes, and by that limit he is bounded. If there is anything equivocal in the language of the grant, the courts declare its interpretation. But if the parties have used plain and explicit language—if they have fixed a boundary which no man can mistake—courts have nothing to say about it; construction in that case has no office to perform, and the law makes no intendment. It may be regarded as a misapplication of the rule of law concerning highways and unnavigable streams to say that it has anything to do with the construction of a deed, or by way of fixing the boundaries of a grant. The pre-

sumption in favor of riparian owners, and the owners of lands adjoining a highway, is only indulged in the absence of any direct evidence of the boundary; it is never used for the purpose of enlarging, qualifying or in any manner affecting the written muniments of title, or the limits which they prescribe. And yet it seems pertinent to refer to the presumptions of law in these cases, in connection with the consideration of the rules of construction of grants in respect to boundary of lands conveyed. It is an old maxim that "the scope and end of every matter is principally to be considered; and if the scope and end of the matter be satisfied, then is the matter itself and the intent thereof also accomplished." According to Lord Hobart, "the law, being to judge of an act, deed or bargain, consisting of divers facts, containing the will and intent of the parties, all tending to one end, doth judge the whole, and gives every part his office to make up that intent, and doth not break the words in pieces" (*Clanrichard v. Sidney, Hobart's R.*, 273, 275). The intent of the parties to a deed is to govern the question of boundary, as before suggested; and it is the duty of the court, when called upon to give construction to a deed, to find by established rules what was the fair, natural and probable intent of the parties to the document. For this purpose, the language employed in the conveyance is first to be resorted to. If the words employed are free from ambiguity and doubt, and express plainly and distinctly the intent according to the most natural import of the language, there is no occasion to look elsewhere. But where the meaning of words is doubtful, or where it is seen the same words have different meanings, when employed under different circumstances or to effect different objects, resort may be had to extrinsic circumstances; and the courts may seek for that intent in every legitimate way (*Vide Long v. Wagener, 47 Mo. R.*, 178).

Another rule of construction may be here referred to, viz., that a clear general description of the premises in a deed is not controlled by any subsequent expressions of doubtful import in respect to certain particulars (*Ela v. Card, 2 N. H. R.*, 175). But words of general description in a deed are controlled and rendered certain by the particular description of the premises, which the deed purports to convey (*Smith v. Strong, 14 Pick. R.*, 128; *Barnard v. Martin, 5 N. H. R.*, 536). If the descriptive words of a deed are wholly without ambiguity, and are followed by a clause repug-

nant, this second clause must be rejected (*Cutler v. Tufts*, 3 *Pick. R.*, 272). On the same principle, courses laid down in a deed which are regugnant to the remainder of the description may be rejected, if the remainder contains sufficient that is intelligible and consistent to uphold the deed according to the evident intention of the parties (*Beal v. Gorden*, 55 *Maine R.*, 482; *Johnson v. Simpson*, 36 *N. H. R.*, 91; *Reed v. Spicer*, 27 *Cal. R.*, 57). And where several particulars descriptive of the land conveyed by a deed are named therein, some of which are false, if the true are sufficient to designate the land, the false will be rejected (*Abott v. Abott*, 53 *Maine R.*, 356). So, also, if the description of the boundaries in a deed of land equally admits of two constructions, one of which would make the quantity of land conveyed agree with that mentioned in the deed, while the other would make the quantity conveyed largely exceed that mentioned in the deed, the former construction must prevail (*Herrick v. Sixby*, *Law R.*, 1 *P. C.*, 436). Where a conveyance contains a general description of the property, which is definite and certain in itself, and is followed by a particular description, the latter will not limit the grant which is clear by the former. But where the general description is indefinite and uncertain, and reference to the particular description must be had to ascertain with certainty the subject of the grant, the whole language must be taken together, and if upon the whole instrument there is sufficient to manifest the intention of the parties with reasonable certainty, that will suffice (*Barney v. Miller*, 18 *Iowa R.*, 460; and *vide Myers v. Ladd*, 26 *Ill. R.*, 415). And general words in a deed, descriptive of the land conveyed, will not be restrained by restrictive words, added *ex majore cantela*, or by affirmative words more restrictive, which have no tendency to make a general description ambiguous and uncertain (*Bott v. Burnell*, 11 *Mass. R.*, 163). If two clauses in a deed stand in irreconcilable contradiction to each other, the first clause will prevail, and the latter be regarded as inoperative; and the law will construe that part of a deed to precede which ought to take precedence, in whatever part of the instrument it may in fact be (*Doe v. Porter*, 3 *Pike's R.*, 18; *vide Tucker v. Meeks*, 2 *Sweeney's R.*, 736).

It is a sound rule, in the construction of a deed, that a perfect description, which fully ascertains the *corpus*, is not to be defeated by the addition of a further and false description. But the court

has no right to strike out one part of the description more than another, unless the part retained completely fits the subject claimed, and the rejected part does not; and unless, further, it appear that the whole description, including the part sought to be rejected, is applicable to no other thing. It must be shown, at least to the degree of moral probability, that there is no *corpus* that will answer the description in every particular (*Mayo v. Blount*, 1 *Iredell's R.*, 283). Where a general description of the land intended to be conveyed is given in a deed, and also the particular boundaries, the latter are to govern (*Thorndike v. Richards*, 1 *Shepley's R.*, 430; *Woodman v. Lane*, 7 *N. H. R.*, 241). And general words in a deed are never restrained by restrictive words added, when such words do not clearly indicate the intention and designate the grant (*Field v. Huston*, 8 *Shep. R.*, 69). If the description in a deed be so vague and contradictory that it cannot be ascertained what is meant, the deed is void. But different descriptions will be reconciled, if possible; or, if irremediable, yet if one of them point out the thing intended, a false or mistaken reference to another particular will not avoid it (*Proctor v. Pool*, 4 *Dev. R.*, 370; *vide Campbell v. Johnson*, 44 *Mo. R.*, 240). When there is a sufficient description of premises set forth in a deed, by giving the particular name of a close or otherwise, a false demonstration may be rejected; but if premises be described in general terms, and a particular description be added, the latter controls the former (*Makepeace v. Bancroft*, 12 *Mass. R.*, 469; 1 *Greenleaf's Ev.*, 301). Where there are two descriptions in a deed, one of which is correct and complete in itself, and the other, which is subordinate, is not so, the latter will be rejected as surplusage (*Myers v. Ladd*, 26 *Ill. R.*, 415). And later words in a deed, which contradict the previous, are to be rejected, if they cannot be reconciled with the obvious intent of the instrument (*Havens v. Dale*, 18 *Cal. R.*, 359). When a deed contains two conflicting descriptions of the granted premises, of equal authority, it seems that the one the more favorable to the grantee will be adopted (*Vance v. Fore*, 24 *Cal. R.*, 435). So a deed poll, ambiguous in its terms, in the absence of any other mode of ascertaining the intent of the party executing it, is to be taken most strongly against the party executing it (*Beeson v. Patterson*, 36 *Penn. R.*, 24). But when there are contradictory descriptions given of a thing, that description

will be adopted which, in its nature, is least liable to be erroneous (*Miller v. Cheney*, 3 *Jones' Eq. R.*, 24). If the language of the instrument is susceptible of more than one construction, the intent of the parties to be collected from the whole instrument must govern; and, in order to ascertain that intent, the court may take into consideration the extrinsic circumstances authorizing the transaction, the situation of the parties, and the subject-matter of the instrument. This is the established rule of the common law, and, in respect to conveyances of real estate in the State of New York, has been declared by statute (*French v. Carhart*, 1 *N. Y. R.*, 102). The rule that a grant is to be construed most favorably for the grantee, is inapplicable where the State is grantor; and it has been held, at least in one case, that the rule is also inapplicable where the grantor is a corporation holding a street for public purposes, and disposing of the adjacent lots for private use, and that in such case the boundary of the private property by that held for public purposes, will be the dividing line between the two, the same as when one lot is bounded by another (*Wetmore v. Story*, 22 *Barb. R.*, 414). When one deed refers to a description in another deed, the description in the second deed becomes a part of the first (*Vance v. Fore*, 24 *Cal. R.*, 435; and *vide Wildman v. Taylor*, 4 *Benedict's R.*, 42).

Words indicating quantity in the descriptive part of a deed, when conflicting with words of more accurate description, yield. Quantity is regarded as the least certain mode of describing land, and hence must yield to description by boundaries and distances. But still, words indicating quantity are to be regarded as part of the description, and are not qualified by this addition of the words "more or less" (*Pierce v. Fauner*, 37 *Maine R.*, 63; *Chandler v. McCord*, 38 *ib.*, 564). In construing a deed, words cannot be transposed in order to give the instrument efficacy, unless there is something which shows that reading the deed as it is, will defeat the intention, and that by transposing words or sentences, or leaving out parts, the deed will be rendered effectual in the manner intended by the parties, though badly expressed. And in construing a deed, a provision relative to one subject cannot be taken from that subject and applied to another, in order to give a different meaning to the instrument (*Kea v. Robeson*, 5 *Ired. Eq. R.*, 373). But a boundary mentioned in a deed may be rejected, where it is clear, from all the circumstances of the case, that it

was erroneously inserted (*Bosworth v. Sturtevant*, 2 *Cush. R.*, 392). When a line is given in a deed as running from one monument to another, it is always presumed to be a straight line, unless a different line is described in the deed, so that by ascertaining the monuments at the angles of a parcel of land, the boundary lines can at once be determined (*Allen v. Kingsbury*, 16 *Pick. R.*, 238, 239). A conveyance is to be construed in reference to its visible locative calls, as marked or appearing upon the land, in preference to quantity, course, distance, map or anything else, as they are more material and certain in their character (*Van Wyck v. Wright*, 18 *Wend. R.*, 157; *Loomis v. Jackson*, 19 *Johns. R.*, 449; *Doe v. Thompson*, 5 *Cow. R.*, 371).

It is well settled by the authorities that a plat or map, referred to in a deed, becomes, for the purpose of identifying the land, a part of the deed itself (*Seaward v. Malotte*, 15 *Cal. R.*, 304; *Vance v. Fore*, 24 *ib.*, 435; *Lincoln v. Wilder*, 29 *Maine R.*, 169). The general rule in regard to the construction of the description of the premises in a deed is one of the utmost liberality. The intent of the parties, if it can by any possibility be gathered from the language employed, will be effectuated. And where one deed refers to another for description of the granted premises, reference may be had to the description in the latter to aid in the construction of the description of the former (*The German Mutual Insurance Company of Indianapolis v. Grim*, 3 *Abb. L. J.*, 73; *S. C.*, 32 *Ind. R.*, 250). A deed must be construed, as before stated, so as to carry into effect the intention of the grantor if it can be ascertained; and if it cannot, then in the manner the most favorable for the grantee, on the principle that a grant is to be taken most strongly against the grantor. The more certain and more prominent of two monuments referred to in a deed, which are incompatible with each other, must prevail over the other. The rule is quite plain that a general description may be affirmed or restricted by a special one; but the difficulty consists in the application of it, and in determining whether the language was used in a restrictive sense; and it is difficult to find any precise rule, furnishing an unerring guide in such inquiry. The leading idea to be obtained from the case is, that what is more certain shall prevail over that which is less so; and the part of a description which the parties must be supposed most fully to understand, will triumph over that which is more obscure and

uncertain (*Lincoln v. Wilder*, 29 *Maine R.*, 169). The description of land in a deed which seems certain and without ambiguity, for anything appearing on the face of the deed, is not rendered uncertain by extrinsic facts, and parol evidence is not admissible to contradict such description (*Bratton v. Clawson*, 3 *Strobh. R.*, 127).

It may be added that the construction of a deed from the State or other public body, in respect to the description of the land conveyed, must be the same as if such description were used in a deed between private individuals. The doctrine of strict construction, as applied to the execution of naked statutory powers, has no application in such case. This doctrine was declared by the Supreme Court of the State of Illinois, in the case of a tax-deed, and it would seem to be reasonable and sound (*Blakeley v. Bestor*, 13 *Ill. R.*, 708).

CHAPTER XI.

CONSTRUCTION OF PARTICULAR CONVEYANCES IN RESPECT TO BOUNDARY—ILLUSTRATIONS OF THE RULES OF CONSTRUCTION BY THE CASES CONSIDERED—CASES MISCELLANEOUSLY STATED.

THE rules which have been settled for the construction of grants in respect to boundary, and the principles by which the descriptive language of deeds is to be governed, will further appear by the consideration of a few of the leading cases in which particular conveyances have been construed by the courts. The cases will be given without reference to the dates or places where decided.

A very recent case came before the Supreme Court of the State of New York, not yet reported, in which the author was engaged as counsel, and which involved the construction of a deed conveying a parcel of land lying between the Oswego canal and a "hydraulic canal" in the village of Fulton. The language of the description in the conveyance was as follows: "That parcel of land situate in the village of Fulton, as the same is laid down on Peter Schenck's map of said village, made in 1844, with amendments in 1853, now on file in Oswego county clerk's office, viz., Lots 1 and 2, between the mill canal and Oswego canal, on block No. 19." The defendants claimed that the description in the

deed carried them to the center of the "mill canal;" and the whole case turned upon the construction to be given to the descriptive language used in the conveyance. The case was tried before a referee, who decided that the defendants took no title to any part of the mill canal under their deed, and his decision was affirmed on appeal to the General Term. The facts of the case were referred to as tending to aid the court in giving construction to the deed. Talcott, J., who delivered the opinion, said: "We think the conclusion of the learned referee was correct. As we understand the case, the mills were situated on the westerly side of the canal, and the water contained in the canal could not be used for power on the easterly side. The points of the counsel for the defendants state that 'there was no way of discharging water from the lots on the east side of their mill canal. There was no wall, and no gates on that side, and no reason for any restrictions;' and such we understand to be the conceded facts of the case. It is, and was, therefore, obvious that this 'mill canal' was merely an artificial reservoir, designed to hold water for the mills, and to be for the use of the mills. It may be conceded that, if the mill canal had been a natural stream of water, the conveyances in this case would have carried the defendants' title to the *flum aquæ*. This, however, is not always true, even in regard to natural streams. As is said by the Court of Appeals in *Dunbar v. Williams* (37 N. Y., 250): 'The presumption in favor of an adjacent proprietor and of his successors in interest is not a *presumptio juris et de jure*, but yields to the evidence displacing the grounds on which it rests.' It was, therefore, held in that case that the presumption, that a conveyance to the center line is intended, arises only where the grantor is owner of the fee to the center line. Much less does this presumption conclusively arise where the body of water is contained in an artificial reservoir, constructed for purposes wholly irrespective of any connection with the premises conveyed by the conveyances to which the presumption is sought to be applied, and where such a presumption would be inconsistent with the uses and purposes for which it is obvious the way or water reservoir was created. * * * Here the claim of the defendants to go to the center of the mill canal is based solely upon the fact that the map referred to in the conveyance, under which they claim, represents their premises as running to the westerly bounds of the canal. On the same map the

canal is laid down as the 'mill canal.' It was manifestly an artificial construction, intended solely for the use and benefit of the mills constructed on the west side of the canal; and the description of it as the mill canal was a clear indication that the canal was intended for and appropriated to the mills, and was not intended as a mere boundary or division between the lots lying east and west of it. * * * Since it is established that the presumption of an intent to convey to the center of the object upon which the land conveyed abuts may be refuted by proof of extraneous circumstances, we think the surrounding circumstances which appear in this case are sufficient to rebut any presumption that the grantors in the deed, under which the defendants claim, intended to convey by that deed any rights in the mill canal" (*Hoff v. Toby, G. T., 4th Dep., 1873*).

In this case, the premises conveyed to the defendant lay upon the east side of the mill canal or reservoir, while the mills were all on the opposite side; and it may be inferred from the opinion of the court that, had there been no extraneous evidence in the case, the defendant's conveyance would have carried them to the center of the canal. It may be stated, however, that the object called a "mill canal" was not a *water-course*, either natural or artificial. It was simply an artificial structure in the *form* of a canal, into which water was taken from a pond created by damming the Oswego river, to be used as a power. It had no outlet except as the water was drawn from different points along the westerly side of it, or as the water might overflow along the same side, when it was not used in sufficient quantities to prevent the overflow. It is doubtful, therefore, whether the same presumption would obtain, in such a case, as in case of a natural or artificial water-course. But the circumstances clearly negative any presumption that it was the intent of the grantors to convey to the defendants any rights in the canal, and those circumstances were very properly taken into consideration by the court in giving construction to the descriptive words of the conveyance.

A late case before the Court of Appeals of the State of New York, which came up on appeal from the Superior Court of the city of New York, involved the construction of two deeds, upon which the case principally turned. The action was ejectment to recover possession of a quadrangular lot of land on the south-east corner of Bleecker and Grove streets in the city of New York,

being about seventeen feet one inch in front, running back about seventy-four feet ten and a half inches on both sides, and being about thirteen feet seven and three-fourths inches in the rear. The premises were originally in 1810, and prior to 1837, a public highway, and a part of Grove street, which was north of the original city of New York, and south of the lands laid out on the commissioners' map, being part of what is called Greenwich village. This statement seems necessary in order to a correct understanding of the questions involved. The first deed calling for construction bounded the premises "northerly by Grove street," but contained a statement of the dimensions of the premises conveyed, which could be obtained without taking any portion of the street. The court held that this deed carried the grantee to the center of the street, laying down the rule that where a conveyance of a city lot, describes it as bounded on a street, the conveyance vests in the grantee a title to the middle of such street, subject to the public easement, unless there is evidence of an intent to exclude the street; and that a statement of the dimensions of the lot is not sufficient evidence of such an intention, but that such statement must be regarded as subordinate to and contradicted by the previous reference to the street.

Subsequent to the conveyance just mentioned, the city closed the street and legally appropriated it to another use; after which the owner of the premises, holding under the last-mentioned conveyance, deeded the land, describing it the same as in the deed under which he held, with this difference, that, in one part, the words are "northerly by the *late* line of Grove street," instead of "northerly by Grove street;" but the deed contained the statement that the premises intended to be conveyed were the same as were conveyed by the deed under which the grantor held. The court decided that this deed did not carry the grantee to the center of the late Grove street, but to its margin only; holding in general terms that a conveyance of a lot which was originally bounded by a street, made after that portion of it which was a street has been legally closed and appropriated by the city, describing such lot as bounded by the *late* line of such street, but to its margin only; and that a reference therein to the deed under which the grantor derived his title previous to the change in the street, as being the same premises thereby conveyed, will be controlled by the specific description. In respect to this, Miller, J., who

delivered the opinion of the court, observed: "It is said, that the expressions employed will be presumed to refer to the late center line, in connection with the words after the description 'along and on Grove street.' I think that it will not bear this interpretation. The description evidently makes a distinction between the old line and the new one, and, in stating a line for a boundary, it cannot well be said, that the statement of itself makes the center, the line" (*Sherman v. McKeon*, 38 *N. Y. R.*, 266, 272). This case is of obvious importance, not only as showing the presumptions which exist in respect to deeds bounding lands upon streets, but also as showing what evidence is required to change such presumptions.

A case lately came before the Supreme Court of the State of New York, involving the construction of a deed describing the premises intended to be conveyed as 200 acres, more or less, in the right of Walton, Kirby and Clopper, in lot No. 1, in the twenty-fourth allotment of the patent of Kayaderoseras. The court held, Rosekrans, J., delivering the opinion, that the description contained several particulars, and that no lands could pass by the deed except such as corresponded with all the particulars; and further, that it was necessary that those claiming under the deed should show that the lands claimed were in lot one, and in that part of the lot to which the right of Walton, Kirby and Clopper extended. That if such right included more than 200 acres, the grantees would have been authorized to have elected which 200 acres in the tract they would take, and such election would have made the grants operative, although the description was so uncertain that, of itself, it would convey nothing (*Finlay v. Cook*, 54 *Barb. R.*, 9).

In a recent case before the Superior Court of the city of New York, the question arose upon a deed which described the boundary of a city lot as running to the westerly line of a street; thence "northerly along the easterly line" of such street. The question presented was as to whether the deed carried the grantee to the center of the street; and the court held, in conformity to other authorities upon the subject, that it did not; in other words, that such a deed conveys no part of the street adjoining the lot bounded upon it in those words (*Coster v. Peters*, 5 *Rob. R.*, 192). And in another case before the same court a year later, the descriptive language of a conveyance was considered. The description of

certain premises fronting on Greenwich street, and not on Washington street, as given in a deed thereof by a grantor who owned land extending from one of those streets to the other, commenced at a fixed point on Greenwich street, and then called for seven courses, each running a certain and definite distance, and reaching a certain point therein, said to be eighty-six and one-half feet or *thereabouts* from Washington street. The court held that, in case they were not identical, the indefinite and uncertain point indicated by the term *thereabouts*, must give way to the more definite and certain point fixed by the courses and distances from Greenwich street. And that inasmuch as the courses and distances from Greenwich street, given in such deed, extended both the north and south lines of the premises conveyed to points nearer to Washington street than those therein stated to be a certain number of feet or *thereabouts* from the latter street, they must govern, because not only more definite and certain, but more favorable to the grantee (*Palton v. Stitt*, 6 Rob. R., 431).

In 1860, the Supreme Court of the State of New York passed upon a deed of certain lands to Mary Berger, dated July 17, 1851, by the following description: "All those certain nine lots, pieces or parcels of ground, situate, lying and being on Mount Prospect, in the ninth ward of the city of Brooklyn, and known and designated on a certain map of 151 lots of ground on Mount Prospect, Brooklyn, L. I., made by Jeremiah Lott, surveyor, and dated September 18, 1833, and duly filed in the Kings county clerk's office as and by numbers 140, 141, 142, 143, 144, 145, 147 and 148, including the land adjoining said lots to the center of North street, as laid down on said map, subject to be opened as a public street whenever the owners of a majority of the lots fronting thereon shall decide." The lots conveyed were bounded, by the map referred to, on the west by the Flatbush turnpike, but, between the date of the filing of the map and the giving of the deed, the location of the turnpike road was altered by the proprietor, so that at the time the deed was given an addition had been actually made to the lots in question, provided the lots were still to be regarded as extending to the road; and the question presented was substantially in respect to this additional land. The court held, in the first place, that the map referred to became a material and essential part of the conveyance, and was to have the same force and effect as if it had been incorporated into the deed. And, in the second place,

that as the lots conveyed by the map were bounded on the west by the public turnpike road, the effect of the deed was to convey the lands up to the turnpike road, as that existed and was located at the date of the deed; and that the true boundary was to be ascertained, not by inquiring where the east line of the turnpike road was on the 18th of September, 1833, when the map was filed, but on the 17th of July, 1851, when the deed was given; the idea being that, as the line of the turnpike road had been changed between those dates, the grantor, if he did not design to convey according to the existing state of things, should have qualified the force of the description on the map by an intimation of the change in his deed. Brown, J., who delivered the opinion of the court, said: "The true boundary is to be ascertained, not by inquiring where the east line of the turnpike was on the 18th of September, 1833, when the map was filed, but on the 17th of July, 1851, when the deed was given. How can it be otherwise? The deed contained no intimation where the boundary was, but referred to the map for that purpose, which then became a part of the deed. The map bounded the lots upon the westerly side by the Flatbush turnpike road, and thus the grantor adopted the line of the road, as it then was located, as the true boundary. This deed, if there is any uncertainty in the description, is to be taken most strongly against the grantor, and construed most favorably for the grantee.

* * * If he had designed to limit his grantee to a boundary short of the line of the road, it was an easy thing for him to have put the limitation in the deed, or qualified the force of the description on the map, by an intimation that the turnpike road had been altered. But having conveyed by the map, without limit or qualification, and that paper giving the road as the western boundary of the lots, he has parted with the title up to that line as effectually as if he had given the road as the boundary by express words written in the deed" (*Glover v. Shields*, 32 Barb. R., 374, 379-381). This is an important case, and fixes a rule in respect to maps referred to in deeds which is very essential to be remembered by conveyancers.

In a comparatively late case before the same court, involving the subject under consideration, the description in a deed commenced as follows: "Beginning at the north-east corner of lands owned by the party of the first part, and by the line fence running from thence south along the west line of land owned by the party

of the second part." Under this description the court held that, if it could be clearly proved that such north-east corner and the fence were several chains apart, the latter would be the true starting point, being a visible and tangible object. And the general rule was applied, that courses and distances must yield to natural or artificial monuments or objects (*Kayner v. Timerson*, 46 Barb. R., 518; *vide Thompson v. Wilcox*, 7 Lans. R., 276).

The same court put a construction upon another conveyance in 1864, unlike any of the preceding cases, and which may be regarded as somewhat particular. The plaintiff and defendant were the owners of adjoining lots, the plaintiff's being the north and the defendant's the south lot. Both parties claimed title from the same sources, the plaintiff's deed being the oldest, but the defendant's lot had been previously contracted to be sold to one Ostrum, who was then in possession under his contract. A brick building stood on the plaintiff's lot, at the date of his conveyance. The description in the plaintiff's deed was as follows: "Thence continuing the same course along the front of said building, seventy-nine feet nine inches, to the corner thereof, being the north line of premises contracted to J. C. Ostrum; thence easterly along the south side of the *brick wall* of said building, seventy-seven feet, to an alley," with a reservation to the grantor of "the free and uninterrupted use of the south wall of the Collins' buildings, for the support of the timbers and floors of the store and building adjoining, occupied by J. C. Ostrum, as the same is now used, and the use of the chimney flues in said wall," etc. The foundation wall of the building on the plaintiff's lot, on the north side, projected about six or eight inches beyond the south face of the brick wall. The plaintiff claimed that his deed carried him to the south line of the *foundation wall*, instead of the south line of the *brick wall*, of his building, and the question for the court was as to the propriety of this claim. A majority of the court, with one judge dissenting, held that the division line between the lots mentioned in the plaintiff's deed was intended to be a straight line from the south-west corner of the *building* to the rear of the lot; and that the terms "corner of the building," and "along the south side of the brick wall," clearly limited the plaintiff's south line to the outer surface of the brick wall; and that therefore the plaintiff had no title to the strip of land in suit. The case was ably argued by Johnson, J., who gave the prevailing opinion of the court, who

declared that, in his judgment, the conclusion arrived at was clearly to be gathered from the terms of the description in the plaintiff's deed alone. Welles, J., concurred with Johnson, J., and J. C. Smith, J., dissenting, but with no opinion, and the case does not seem to have been again before the courts (*Comes v. Minot*, 42 Barb. R., 60).

A couple of years later, a case came before the same court requiring the interpretation of the description contained in a contract, wherein the land sold was described as a lot bounded "on the east by the cove," and also as "being the east part of lot number twenty-one," on a certain map, made by one Webb. The cove referred to was made by the water which sets back from the Chemung river, and the question was, whether this description embraced the land on the east side of the parcel described to the edge of the water of the cove, or whether it extended only to the east line of the lot number twenty-one, as laid down on the map. The court held that the cove being mentioned in the contract as the east boundary of the land sold, it could not be controlled or changed by the reference in the contract to the map made by Webb, or by the east line of lot number twenty-one, as laid down on that map; and it was said by Balcom, J., who delivered the opinion, that it was immaterial whether that lot extended as far east as the cove or not, or whether any portion of such lot lay within the boundaries mentioned in the contract; that these boundaries being marked by known and certain monuments must control in construing the contract. These monuments were visible, and the parties undoubtedly understood that lot number twenty-one embraced all the land within them; and the fact that such lot did not extend to the east boundary mentioned in the contract was not regarded as controlling, and should not prevent the description from extending to the west edge of the water constituting the cove, and the description was so construed by the court (*Jones v. Holstein*, 47 Barb. R., 311).

The Court of Appeals of the State of New York, in 1861, gave a construction to a deed of land described by the lot number upon a map simply. The owner of one-half of a block of land in the city of Rochester, which block was surrounded on all sides by streets opened and used as highways, caused his portion of the block to be surveyed and subdivided into lots, and a map to be made representing such lots as abutting upon a street extending

from Kent street, one of the boundaries of his tract, through the center thereof, and also through the land of adjoining proprietors, to another publicly traveled street. This proposed avenue was designated on the map as Erie street, and lots were sold, and the lots described in the deeds in this manner: "Lot No. I, section G, according to allotment and survey of part of Frankfort [a portion of Rochester including the tract in question], made by Elisha Johnson; said subdivision being thirty-three feet front and rear, seventy feet deep;" but without any mention of or reference to this Erie street by name; and the depth of the lot was stated by figures on the map, which would not include any portion of the street. The question presented for adjudication in the case was whether the deeds conveying these lots on either side of Erie street, in the city of Rochester, before such street became a public highway, and was opened as such, carried the lands to the center of that street. The Supreme Court held that they did not; but the Court of Appeals reversed the judgment, holding that the grantor had dedicated such street as between him and his grantees; although his map represented it as continuing through the land of an adjoining proprietor, which closed it against any highway in one direction; and such adjoining proprietor never, in any manner, assented to the continuation of the proposed street, nor was any part of the street adopted as such by the public authorities. It was accordingly held by the Court of Appeals that the grantee of all the lots on both sides of the street thus designated was entitled to the exclusive possession of the proposed street against ejectment by the grantor. The doctrine of the case is that, as between grantor and grantee, the conveyance of a lot bounded upon a street in a city carries the land to the center of the street; and that, as between the same parties, the same rule applies, where the conveyance bounds the land upon a street not recognized by the public authorities nor opened, but is only a street by being laid down on the map as such, which was made by the grantor, and according to which the conveyance is expressly made. That is to say, the rule of construction in such case is the same, as regards the parties to the deed, as though the street, laid down on the grantor's map, was in fact a public street, opened and used as such (*Bissell v. The New York Central Railroad Company*, 23 N. Y. R., 61).

Several years later another case came before the same court, calling for the construction of a deed which bounded the land by a "park." This was an action also involving the right to a strip of land in the city of Rochester. The plaintiff was the owner of a small tract of land in that city in 1849, which he caused to be plotted and divided into lots numbered from one to thirty-six, and caused the map to be filed in the Monroe county clerk's office. An open space was designated on the map, fronting upon what was laid down as "James street" on one side, and bounded on the other three sides by nine of said lots, and described as "Park." The plaintiff conveyed these nine lots, at different times, to different purchasers, describing them in each conveyance solely by their numbers, and by reference to said map and its place of record. Several of the lots have no means of approach by any public street or private way, except through the space designated as "Park;" and the question presented was whether the plaintiff, in conveying the nine lots which abutted on the strip called "Park," by numbers, referring to the map, passed the fee in this strip to the grantees, in the same manner and to the same extent as if the strip of land had been dedicated by him as a street for the use of the adjoining lots. The Supreme Court, in which the action was commenced, held that the well-settled rule in respect to boundary upon streets did not apply to this strip of land called "Park;" declaring, as matter of fact, that when the plaintiff plotted this tract he intended the space designated as "Park" to be a park, and not to be a mere passageway, leading by and to the adjoining lots, and that such continued to be his intention when he sold the lots; that part of his design was to afford access to the contiguous lot; but that this was subordinate to the principal and leading object of making it a park. But on appeal to the Court of Appeals the judgment of the Supreme Court was reversed, two of the judges dissenting; the majority holding, as law, that the primary and chief design in laying down this space on the map called "Park," and, so far as the case showed, its only design was that the same should be used as a passageway or street; that, although called a park, it was not a park, and its intended use as a street was beyond question. The doctrine laid down by the Court of Appeals in the case is that, where town lots are sold, and described only by numbers on the recorded map by which they appear to be bounded on a public street or highway, such lots are to be

bounded by the center of such street. And where the open space on the map, by which only such lots can be approached, is designated as "Park," it is, nevertheless, to be deemed as a designed means of access to such lots, and they are to be bounded by the center of such space. It was further declared that these questions of boundary are to be determined by the palpable intention of the parties, as it appears from all the circumstances.

Hunt, J., delivered an able dissenting opinion, in the course of which he said: "A park is essentially different in its nature from a street, and is governed by principles of a different character. It could, under no circumstances, be considered as a line merely. A street becomes a street, as between grantor and grantee, by being so designated on the map by which the lots are sold. It is quite likely that a park may become a park in the same manner. But there is neither authority or principle for saying that lands may be made a street by designating them as a park. It would be as unreasonable as to attempt to create a park from what the owner should designate upon his map as a street." But it was declared in the prevailing opinion that a park is, in its strict sense, a piece of ground inclosed for purposes of pleasure, exercise, amusement or ornament; that this strip was uninclosed — open to the common — and was intended so to remain; nor was it set apart, either for pleasure-ground or for purposes of exercise, amusement or decoration; and, hence, for the purposes of the case, it must be regarded as a passageway or street (*Perrin v. The New York Central Railroad Company*, 36 N. Y. R., 120, 124, 125).

In 1861 a case came before the Superior Court of the city of New York, calling for the construction of certain language in a conveyance, wherein the land was described as running "to the side" of the road, and thence "along the side of the road." The question presented was whether the boundary extended to the center of the said road, or only to the edge; and the court held that the description excluded the road from the conveyance (*Van Amringe v. Barnett*, 8 Bosw. R., 357).

CHAPTER XII.

FURTHER CASES PASSED UPON BY THE COURTS GIVING CONSTRUCTION TO PARTICULAR CONVEYANCES IN RESPECT TO BOUNDARY—CASES MISCELLANEOUSLY STATED.

AN important case in the Court of Appeals of the State of New York, hereinbefore referred to in a different connection, may, with propriety, be alluded to again, on account of the precedent it affords upon the question of construing the descriptive language of a conveyance of lands. The deed brought before the court for construction described the land intended to be conveyed as bounded by the road leading from Jamaica and Flatbush to the Brooklyn ferry. The court held, from the evidence in the case, that the grantor in the deed had title to the land conveyed only to the margin of the road; and the question presented was whether his deed, under the circumstances, should be construed as carrying the grantee to the center of the road. The Supreme Court, where the cause was tried, held that the conveyance extended to the center of the road; but the Court of Appeals reversed the judgment, holding that, although the deed, *prima facie*, carried the grantee to the center of the road, on the assumption that the grantor owned it, but when it was shown that this title to the road-bed was in another at the time of the conveyance, the terms of the deed were satisfied by a title extending to the roadside (*Dunham v. Wilkins*, 37 N. Y. R., 251).

A very recent case before the same court further illustrates the principles upon which the descriptive language in a deed is construed, and the manner in which the construction will be modified by circumstances. According to the memorandum published by the reporter, the conveyance was for a portion of a lot in the city of Rochester, the west boundary of which was given as "the east line of Clyde street." The plaintiff's deed conveyed to him the north half of the lot, and also the northerly half of a dwelling-house situate thereon, described as "fronting on Clyde street," with the land on which it stood, "being about sixteen feet square, with the appurtenances." The south-west corner of the north half of the house projected about seven feet upon the south half of the lot. The defendant's deed conveyed to him the south half

of the lot, excepting and reserving therefrom the land upon which the plaintiff's half of the dwelling-house stood. At the date of the deeds the west side of the house was upon the east line of Clyde street, as opened and used. Subsequently the city authorities changed the street, running the east line thereof to the westward four feet ten inches. The plaintiff took possession and inclosed the space thus left in front of his half of the house. The defendant tore down the fence, claiming title as far north as the north line of the south half of the lot, and the plaintiff brought suit for the trespass. Under these circumstances, the question was presented as to the construction to be put upon the conveyances of the respective parties. The Court of Appeals held (affirming the decision of the Supreme Court) that the original title, and the right of possession of the parties, as derived therefrom, extended no farther west than the east line of Clyde street, as it then was. Further, that the language of the description in the plaintiff's deed carried his right to the center of the street; and when the public abandoned its easement the plaintiff became entitled to the exclusive use of that part of the street abandoned, adjacent to and in front of his half of the house. Andrews and Rapallo, JJ., concurred in the conclusion, but placed their decision upon the ground that the plaintiff was in possession of the *locus in quo*, and the defendant had shown no title; leaving it to be inferred that they did not assent to the construction which the majority of the court put upon the plaintiff's conveyance. The case, however, has full authority as a precedent (*Wallace v. Fee*, 50 *N. Y. R.*, 694).

Another case in the same court was this: An owner of land upon a mill stream, *ad medium filum aquæ*, conveyed a parcel of land by metes and bounds, "beginning at a stake and stones on the west bank of the Unadilla river;" running thence by courses and distances around the farm until it comes again "to the Unadilla river," and runs "thence down the west bank of the Unadilla river, as it winds and turns, to the place of beginning." The question in the case, so far as the subject under consideration is concerned, was whether the grantee, under this conveyance, took to the center of the river; and the court held that he did not. On the contrary, that the title to the river, and the land covered by it, remained in the grantor. Henry R. Selden, J., who delivered the opinion of the court, said, on this point: "The words 'to the

Unadilla river,' according to the usual interpretation of such an expression in conveyances, would carry the line to the center of the river; as the general rule is that, where a line touches a river, it goes to the center; but the words are entirely consistent with an interpretation which should stop the line at the margin or bank of the river; and whether the one or the other interpretation should be given to them, must depend upon the apparent intention of the parties, to be determined by reference to the other portions of the deed.

"The other expressions of the deed, which have reference to the river, I think show a clear intention to limit the operation of the grant to the bank of the river. The starting point is unequivocally from 'the bank,' and not from the center of the river; and if the last line in the description is confined to the center of the river, it cannot run 'to the place of beginning,' as the description requires; and if it starts from the center of the river, and runs 'to the place of beginning,' it would neither follow the center of the river nor 'the west bank as it winds and turns,' according to the description of the deed. From the terms of the deed alone I think it must be held to convey the farm to the west bank of the river only, leaving the title to the river and the land covered by it in the grantors" (*Babcock v. Utter*, 32 How. Pr. R., 439, 453, 454; *S. C.*, 1 *Keyes R.*, 397).

A case came before the present Supreme Court of the State of New York, at an early day, involving the question of boundary of lands lying upon a stream or river not navigable. The land claimed was the north half of the stream and falls in the Esopus creek, at a place called "Demeyer's Falls." By the description in the deed under which the claim was made, the boundary line ran "to the said Esopus kill or river; thence southerly along the said river by a piece of land of Hendrick Alberse, and by his bounds to said river; thence along the said kill or river to the creek brook where first began." The court held that this deed carried the grantee to the center of the stream, and declared that the law was well established that, where lands are bounded by a stream or river not navigable or above tide-water, the grantee takes *usque filum aquæ*, unless the stream or river be expressly excluded from the grant by the terms of the deed. And it was further declared that, in the case before the court, no proof was needed, in terms, as the stream was not navigable or above tide-

water; the fact sufficiently appearing from the existence of the fall and dam, and the uses to which they were applied (*Demeyer v. Legg*, 18 *Barb. R.*, 14). And the Court of Appeals, of the same State, at a more recent date, passed upon a similar description in a deed, and gave a similar decision. The boundary in the deed began "at a post marked No. 0, standing on the bank of Lake Erie, at the mouth of Cattaraugus creek, and on the north bank thereof;" and then run by several courses and distances, and returned to a post also "standing on the north bank of Cattaraugus creek; thence down the same, and along the several meanders thereof, to the place of beginning." It appeared that this boundary crossed the creek three times before reaching the last course but one, and that course and distance carried the boundary across the creek for the fourth time. The question in dispute was whether the last course of the boundary carried the grantee to the center of the creek, or only to the bank; and the Court of Appeals, overruling the judgment of the Supreme Court, held that the description included the bed of the stream to the center. Comstock, Ch. J., who gave the opinion, said: "In this case the boundary begins at a post standing on the north bank of the creek, and it returns to a post also standing on the 'north bank of Cattaraugus creek;' and proceeds 'thence down the same, and along the several meanders thereof, to the place of beginning.' On the part of the defendant it is claimed that 'down the same,' in this description, means down the bank, and not down the creek. But we think this is not the fair construction of the language. The words more obviously refer to the creek, which is the immediate antecedent, than the bank. And, again, the phrase, 'along the meanders thereof,' is more descriptive of the windings of the stream than of the irregularities or sinuosities of the bank. Indeed, this word 'meander' is derived from a winding river in Asia Minor, known by that name in classic history. And, in our language, we say that a stream meanders; but I think we never speak thus of a shore. To speak of a meandering shore would be to use a singularly inapt expression. It may well be added that a strictly shore line upon a river would, in most cases, be extremely difficult to trace. Parties may so restrict their grants if they will; but the restriction ought to be framed in very plain and express words" (*The Seneca Nation of Indians v. Knight*, 23 *N. Y. R.* 498, 500).

A very important case was disposed of by the present Supreme Court of the State of New York in 1864, involving the construction of the description in deeds bounding lands upon streets in a city. The descriptive language in several different parts was considered, but it is only necessary to repeat the description in one. The action related to a strip of land two rods in width and ninety-nine feet in length, and being the north half of a certain portion of Green street in the city of Lockport. The plaintiff claimed under a conveyance of lots 205 and 207, which, after referring to the map, bounded them on the east by Lock (formerly West Front) street sixty-six feet, and "on the south on Green street ninety-nine feet, and being in a body in the corner of Lock street and Green street, containing more or less, according to the aforesaid map, reference being thereunto had." The strip of land was a part of three lots, provided this deed extended to the center of Green street; and the court held that it did; and the doctrine was reiterated, that if it is the intention of the grantor, who conveys lots having streets along them, to exclude the streets, his description must be clear and certain, showing such intention (*Lozier v. The New York Central Railroad Company*, 42 Barb. R., 465). A case came before the same court at a little earlier day, calling for the construction of a deed bounding the land upon one of the streets of the city of New York. The premises were described in the deed as "beginning at the corner formed by the intersection of the easterly line of Greenwich street with the northerly line of Chambers street, 109 feet to the said easterly line of Greenwich street, and thence southwardly along the same, seventy-nine feet and eight inches to the place of beginning." The court held that this description bounded the grantees to the easterly line of Greenwich street, and did not carry them to the center of the street. The well-understood doctrine, however, was expressly recognized by Hogeboom, J., who delivered the opinion of the court, that a description, bounding premises generally on or by a street or highway, or stream of water not navigable, unexplained, carries the boundary to the center of the street or highway, or stream of water, and reference is made to *Hammond v. McLachlan* (1 Sand. R., 323), *Herring v. Fisher* (*Ib.*, 344), *Jackson v. Louw* (12 Johns. R., 252), *Jackson v. Hathaway* (15 *ib.*, 447), *Adams v. Saratoga and Washington Railroad* (11 Barb. R., 414), *Adams v. Rivers* (*Ib.*, 390), *Demeyer v. Legg* (18 *ib.*, 14), *Ex parte Jen-*

nings (6 *Cow. R.*, 518), *People v. Seymour* (*Ib.*, 579), *Canal Appraisers v. People* (17 *Wend. R.*, 571), *Commissioners of Canal Fund v. Kempshall* (26 *ib.*, 404), *Luce v. Carley* (24 *ib.*, 451), as authority for the doctrine. But the judge referred to *Child v. Starr* (*Hill's R.*, 369), *Kingman v. Sparrow* (12 *Barb. R.*, 201), *Halsey v. McCormick* (13 *N. Y. R.*, 296), *Jones v. Cowman* (2 *Sandf. R.*, 235), as authority for holding that this description in the conveyance before the court did not carry the grantees to the center of the street, but only to the outer line thereof (*Wetmore v. Law*, 34 *Barb. R.*, 515, 519, 520). But at the same term of the court another conveyance came before it for construction, wherein the land was described as "situate, lying and being on the westerly side of Greenwich street," and the easterly boundary therein was stated as follows: "bounded easterly in part by Greenwich street aforesaid." It was further described as "containing in front on Greenwich street aforesaid, twenty-four feet ten inches," "and in length on the northerly side, sixty-one feet six inches." And the court held, the same judge writing the opinion, that this description extended the title to the middle of the street, according to the general rule applied in respect to property having similar boundaries. In his opinion, Judge Hogeboom observed: "It is conceded to be the rule as to land in the country, and I think it equally applies to urban territory. *

* * The reason is substantially the same as applied to a road in the country or a street in the city; that is, the intervening strip was originally taken, or supposed so to be, for public purposes, from the owners on opposite sides of the street or highway, taken only for public purposes, and only so much of it both in regard to the quantity and duration of the estate as was supposed to be required for the public use, and is to be returned to the respective proprietors when the public have no farther use for it; or else it was founded upon principles of public policy, based upon the supposed inconvenience or impropriety of having so long and narrow a strip of land or body of water the subject of a distinct and separate ownership from that of the adjoining territory on either side. In other words, the owners of the adjoining lands have the entire property in the land, subject to the public easement and rights. It may be true that, as regards lands in the city, the use of the public is more extended and comprehensive than in the country. It is wanted not only as a road for purposes

of passage and transportation, but also for sewers, for vaults, for gas-pipes, for water-pipes, and other purposes. But the essential characteristic of both is the same, to wit, the public use or necessity. So also the country may ultimately become a town, the town may become a city; and it would lead to embarrassment if different rules of construction were applied to *country* and to the *city* grants, as well as to difficulty in determining when the actual transmutation from country to city property took place. Whether, therefore, we consider the question as one of naked law upon the construction to be given to a legal instrument, or as a rule of evidence to be applied to those instruments for the purpose of ascertaining the real intentions of the parties, I think the result will be the same" (*The People v. Law*, 34 *Barb. R.*, 434, 501, 502). This case is important not only as a precedent in cases where the boundary in a deed extends to the center of a street or highway, but also as giving reasons why the same rule of construction should be applied to city grants as to grants of land in the country. It is well settled that the rule in respect to land in the country will be applied to urban territory, but the reasons why the supposed distinction in such cases should not be recognized, are given with such pertinancy and plainness, that it will not be amiss to note them.

And the same court was called upon, at a much later date, to construe the descriptive words in a conveyance, where the boundary was a range of hills. The grant was for a parcel of land in the old township of Rochester, situate "on the south-east side of the high hills, commonly called the Shawangunk hills." The only boundary necessary to notice was in these words: "Thence runs south-westerly along the top of the said hills on the south-east side thereof, on the highest part of the steep rocks that point north to Shawangunk aforesaid, as the rocks range," etc. It was held that the court was not at liberty to conjecture that the parties to the deed intended to establish the boundary upon a lower elevation, upon the side of the designated hills; and, as the rocks of the range mentioned were objects which were definite and could be fixed with reasonable certainty, a variation in the *course* of the line was not to be regarded, but the true boundary was the line along the highest point of the steep rocks as they ranged upon the summit of the mountain as it fronts the valley (*Schoonmaker v Davis*, 44 *Barb. R.*, 463).

A case came before the New York Court of Appeals, not long since, involving the construction of a conveyance, which it may be of interest to notice. The language calling for construction in the description was this: "All that certain piece or parcel of land situate in the said town of Niagara, being the *west part of lot No. 76*, lying on the easterly side of the Niagara river, containing eighty-five acres, be the same more or less." On the one side it was contended that this description embraced just eighty-five acres of land, located in a certain part of the lot; that the words "more or less" were surplusage, and particularly so here, where the quantity is an essential part of the description. But the court held that the description included all the land of the grantor remaining unsold in the west part of the lot designated, as a different intent was nowhere manifest.

Campbell, J., who delivered the opinion of the court, said: "In the deed the lot is referred to as if it were a well-known tract, piece or division of land; part or division of a larger parcel or tract, that is well known to the parties, the seller and the purchaser. The particular piece or portion is designated, also, as a well-known part or division. The description in the deed is very uncertain and indefinite, but the intent of the seller is very manifest. He conveyed the *west part* of the lot; not the west quarter, or third, or half; not eighty-five acres to be taken from the west part, but the *west part* itself, whatever that might be in acres; eighty-five acres, more or less" (*Pettit v. Shepard*, 32 *N. Y. R.*, 97, 103).

A case came before the Superior Court of the city of New York, in 1866, in which the doctrine as to the boundary upon streets was fully discussed. The deed calling for construction conveyed to the plaintiff's testator a plot of ground on the southerly side of Stewart street, in New York, and which was described in the deed as running along a certain road "to Stewart street, and thence along the westerly side of Stewart street, westerly, etc." The court held, that, under the description, the plaintiff's right extended only to the line of the southerly side of Stewart street, and not to the center of that street, declaring in terms that when, from the description in a deed, it is manifest that the parties intended to limit or extend the conveyance to the lines of the highway or street, no part of the highway or street passes (*Ander-son v. James*, 4 *Rob. R.*, 35).

In 1835, an important case was decided in the late Court of

Chancery of the State of New York, by Vice-Chancellor Williams, which called for the construction of a grant from the State of lands bounded on the Oswego river, in the present city of Oswego. At the time of the issuing of the patent, the Oswego river, at the point in question, was regarded as navigable, although, of course, above tide-water. The patent from the State for the lot in question referred for its location to a map on file in the Surveyor-General's office, upon which map the lot was laid down as bounded on the river generally. The vice-chancellor held that the patentee, under this description, was entitled to hold the land to the middle of the stream, declaring that the law might then be considered settled in the State of New York that grants of land, bounded on rivers and streams above tide-water, extend *usque ad filum aque*, and if the stream is, in point of fact, navigable for boats or other craft, the public have a right of passage or an easement, and nothing more; and that the owner of the adjoining land, or the land bounded on the bank or margin of the stream, has a right to use the land and the water of the stream in any way not inconsistent with the easement due to the public (*Varick v. Smith*, 5 *Paige's R.*, 137). This decision has often been cited in the courts of New York, and always with approval, especially as to the construction put upon the language of the patent, and the rights of the patentee under the same, that is to say, the doctrine of the case stands undisturbed. The late Chancellor of the State, upon a question between the same parties, expressly affirmed the doctrine; holding that where the State conveys a lot by its number and reference to a map on file on which the lot is laid down as extending to a stream above tide-water, the effect is the same as though the patent had described the lot as bounded by the stream, and the patentee takes to the center of it (*Varick v. Smith*, 9 *Paige R.*, 574).

An early case involving a water boundary before the Court of Appeals of the State of New York, may be of interest, though the principles enunciated in it are well settled. The only question in the case was as to the location of the southerly boundary line of the plaintiff's lot. The conveyance, from the source of title under which the plaintiff claimed the premises in controversy, described the land conveyed as follows: "A lot of land fronting the south side of the turnpike road running easterly by Bennett's mills, and joining the east line of lands belonging to the heirs of

Richard W. Pelton, deceased, being five rods east and west in width, and running south from said road *to the bank of the Six Mile creek.*" There was a controversy, not only as to whether the center of the creek or the bank was the boundary, but as to where the bank of the creek was. The court held that the grantee under the deed did not take to the center of the creek, but only to the bank; that the bank intended was the line to which the water would flow at low-water mark, and that such a description included the land to the margin of the stream at low water. And it was declared that the rule which prevails, in this respect, as to grants bounded on the shore or bank of the sea or navigable rivers, is not applicable to streams not navigable (*Halsey v. McCormick*, 13 *N. Y. R.*, 296).

And a very important case in the late Court of Errors of the State of New York is often quoted as a precedent in these cases. The deed calling for construction by the court conveyed 20,100 acres of land on the west side of the Genesee river, bounding it easterly *on the bank of the river, agreeable to the traverse,*" and reserving "out of the above described lands 100 acres which is conveyed by deed to Ebenezer Allen, and is to be laid out in a square form as near as the traverse of the river will admit, and the said Allen's mills to be the center of the eastern boundary." It was held by the court that the whole tract, including the 100 acre reservation, was bounded by the bank of the river and not by the thread of the stream. Several opinions were written by different members of the court, and many cases bearing upon the question were considered. The court was not unanimous in the judgment that was ordered, but there was a degree of harmony in the doctrines which were laid down (*Starr v. Child*, 5 *Denio's R.*, 599).

The Court of Appeals of the State New York have very recently disposed of a case involving the construction of a particular description in a deed. The action was ejectment, and both parties claimed under a common source of title. The defendant's deed was prior to that of the plaintiff, and bounded the land conveyed on one side "by the south-easterly line or side" of what was formerly known as First avenue in the city of Brooklyn. This avenue had never been opened as a public highway, and had been discontinued by act of the legislature. The defendant's conveyance contained this clause also, "together with all the right and

title of the grantor in and to one-half of the streets and avenues by which said lots are bounded." There was no other avenue referred to in the description of the granted premises, and the grantor had title thereto. The court held unanimously that the defendant's deed carried the title to the center of the avenue (*Terrett v. The New York and Brooklyn Steam Saw-mill and Lumber Company*, 49 *N. Y. R.*, 666).

Another late case before the same court was this: The owners of a tract of land caused the same to be surveyed and subdivided into lots for building purposes, and a map thereof to be made, upon which the lots were designated by numbers, and abutted at one end upon a strip designated as an alley, and such owners subsequently conveyed one of the lots, describing it by number on a map, specifying the map referred to, and specifying the boundaries as abutting at one end on the north line of such alley, as laid down on the map. The court held unanimously that this conveyance gave to the grantee a right of way over the alley to the rear of his lot, as against his grantors and their subsequent grantee of the alley. The judge who delivered the opinion of the court stated that the question whether the lot conveyed was bounded by the north side of or the center of the alley, was not material to the right claimed by the plaintiff in the action, which was a right of way over the alley, and the point was not examined (*Cox v. James*, 45 *N. Y. R.*, 557, 561).

The last case which it is proposed to consider upon this subject from the New York reports is one also very recently disposed of by the Court of Appeals of the State, and was presented thus: The defendant agreed to convey to the plaintiff a house and lot in the city of New York. In the description contained in the contract, the lot was stated as "being in depth, on Clinton street, 120 feet, including the stable situated on the rear of said premises." He executed and delivered a deed to carry out the agreement, which followed the description contained in the agreement, except omitting any reference to the stable. It was supposed, at the time of the execution of the contract and deed, that the stable was upon the 120 feet, but subsequently it was discovered that, in order to include the stable, the lot should be 131 feet and ten inches deep. In an action brought by the plaintiff for specific performance, the Court of Appeals held, reversing the order of the Supreme Court at General Term, and affirming the judgment

at Special Term, that under the well-settled rule that, in the construction of grants, courses and distances must yield to fixed, known monuments, the plaintiffs were entitled to a deed that would include the land upon which the stable stood (*White v. Williams*, 48 *N. Y. R.*, 344).

CHAPTER XIII.

FURTHER CASES PASSED UPON BY THE COURTS GIVING CONSTRUCTION TO PARTICULAR CONVEYANCES IN RESPECT TO BOUNDARY — CASES MISCELLANEOUSLY STATED.

ALL of the cases heretofore considered under this head have been decided by the different courts of the State of New York. They are, however, of universal application as precedents, as none of them were disposed of in pursuance of any usage or statute. It is proposed now to refer to some leading authorities upon the same subject to be found in the judicial reports of other States and of the Federal courts. These cases will be considered without particular regard to where or when they arose.

A recent case came before the Supreme Court of Errors of Connecticut, involving the boundary of land upon a highway. The petitioner was the owner of a piece of land specifically described in the conveyance to him. The land was actually bounded on the west by the highway, although the deed did not in terms bound the same on such highway. The court declared the rule of law to be well established, that a conveyance of land bounded on a public highway carries with it a fee to the center of the road as part and parcel of the grant. And as it was established that the land in question was in fact bounded upon the highway, the court held that the mere fact that it was not so described in the deed would not vary the construction. In either case, it was thought by the court, the presumption that it was not the intention of the grantor to withhold his interest in the road to the middle of it, after parting with all his right to the adjoining land, would be the same. That is to say, unless such intention clearly appeared the presumption would apply. The court could see nothing in the language of the deed, or in the situation or circumstances of the property conveyed, to warrant the inference that any such inten

tion existed in the case, and therefore it was held that the grantee in the deed under consideration took to the center of the road (*Gear v. Barnum*, 37 Conn. R., 229).

The Supreme Court of Missouri has recently made a decision illustrating the rules of construction to be applied to a deed of real estate, which is of considerable interest in a certain aspect of the subject. The language conveying the premises was: "Lot No. 3, in block 87, in the old town of Hudson, now Macon, beginning at the north-east corner; thence west to the alley; thence * * * to the beginning." The description in fact embraced less than lot 3; but the court held that the description by lot should prevail over that by courses and distances, and that, therefore, the whole of the said lot 3 was conveyed. This rule of construction the court thought a reasonable one, and one that was generally acquiesced in (*Rutherford v. Tracy*, 48 Mo. R., 326).

A late case came before the Supreme Court of Maine, where both termini of the boundary in a deed were on the westerly side of the road, and it was held that the deed should be construed so as to exclude the road on the east; that is to say, the deed was construed by the court as bounding the land conveyed by the westerly side of the road (*Cottle v. Young*, 59 Maine R.).

In a late case before the Supreme Court of Errors of Connecticut, where it appeared that a right of way had been granted to a railroad company across certain lands bounded upon a harbor, and was described as "extending from said harbor on the west to the land of William H. Noble on the east," the court held that the right of way extended across the mud flats west of the land between high-water mark and low-water mark. Seymour, J., who delivered the opinion of the court, said: "The plaintiff is undoubtedly right in the claim that in Connecticut the owners of land bounded on a harbor own only to high-water mark, and that whatever rights such owners have of reclaiming the shore are mere franchises. Where, however, such reclamations are made, the reclaimed portions in general become integral parts of the owner's adjoining lands. By means of such reclamations the line of high-water mark is changed and carried into the harbor, and the owner's lands have gained the reclaimed shore by accretion; the principles governing the case being the same as those which prevail where the sea recedes gradually by accession of soil to the land.

"If the grant had been in terms of a right of way to and from

the harbor, the grantees would be entitled to come to the harbor, over whatever intervening accessions of soil might accrue between high and low-water mark. If the line of high-water mark should be changed by natural or by artificial causes, the right of way would follow the changed line of the harbor, and this deed in connection with the map shows that the object of the deed was to enable the grantees to reach the harbor, and by means of the right of way therein granted to connect their road on the east with the harbor and their road across the harbor on the west" (*Lockwood v. The New York and New Haven Railroad Company*, 37 Conn. R., 387, 391).

An interesting case was recently disposed of by the Supreme Court of New Hampshire, calling for the construction of the descriptive language of a conveyance. It appeared that three successive deeds had been given, "reserving about three-fourths of an acre of land in and about the graveyard on said premises, as now staked out, to be kept for a graveyard lot for the heirs." There was a graveyard on the farm conveyed, about four rods square, inclosed by stone posts and chains. The court held that, if there were no monuments on the ground to answer the description "as now staked out," so that the land intended to be excepted could not be located without resort to a parol agreement contemporaneous with the first deed, the exception must fail as to all but the graveyard then on the premises. The court considered the words "as now staked out" to constitute a material part of the description, and, consequently, that the three-fourths of an acre could not be located in a square form about the graveyard (*Andrews v. Todd*, 50 N. H. R., 565).

A conveyance of lands in the State of New Jersey described the premises by courses and distances, with the addition of the words "being the same premises conveyed to K., the grantor, by N., by deed dated," etc. The Court of Chancery of the State held that this conveyance included the whole premises contained in the deed to the grantor, although the specific description omitted a small strip of the land covered by it (*Wuesthoff v. Seymour*, 22 N. J. Eq. R., 66).

In a conveyance of a town lot in North Carolina, the numbers of the lot upon a plat of the town were given to identify it, and a reference was also made to neighboring streets; but the two parts of the description were inconsistent with each other. The court

held that the reference to the streets must give way, for the reason that the lot was the object and not the street. The court further intimated that a description, in pursuance of the primary object for which the lot was mentioned or named, is less apt to be erroneous than a description by reference to the number or name of the street, as that is incidental, and is a secondary and not the primary object for which the streets were named (*Doe v. Wilmington, etc., Railroad Company*, 67 N. C. R., 413).

In a case recently decided by the Supreme Court of Illinois, the deed which called for construction bounded the land, by monuments and courses and distances beyond dispute, "to the west side of C. creek, thence down the west line of said creek to the north line of said quarter section." The court very properly decided that an express grant fixes its own limits, and that the rule that land bounded by the bank of a stream necessarily excluded the stream itself, applied to this description. It was therefore held that this deed carried the grantee only to the west bank of the creek, and did not give him any right in the bed of the stream (*Rockwell v. Baldwin*, 53 Ill. R., 19).

The Supreme Court of California has lately decided that, where the courses called for in a deed were described as east, west, south and north, and were controlled by other well-defined and certain descriptions, in order to harmonize all the calls of the deed these words might be read easterly, westerly, southerly and northerly. The court was very clear in the opinion that this was the proper construction to be put upon the descriptive language of the deed, and it was interpreted in accordance with this view (*Faris v. Phelan*, 39 Cal. R., 612). And in another case before the same court, involving the construction of the description in a deed of conveyance which ran thus: "All my rights, etc., to a parcel of land situate, etc., being block No. 9, the same on which I now reside. The part thus donated commences at the north-east corner of said block, running twenty-five varas west from said corner; thence back one hundred varas." The court held this to be a sufficient description, and that it effectually conveyed a strip off the easterly side of the block twenty-five varas wide and one hundred varas deep. (*De Levillain v. Evans*, 39 Cal. R., 120).

A man owning lands on both sides of a stream not navigable, in the State of West Virginia, conveyed a portion of his land on one side of the stream, and bounded it generally by the stream. The

Supreme Court of the State held that the conveyance passed a moiety of the bed of the stream or water-course to the grantee; declaring that such should always be the construction to be put upon similar conveyances, unless such a construction of the grant be clearly excluded by its own terms (*Camden v. Creel*, 4 W. Va. R., 365).

A very interesting case was lately decided by the Court of Chancery of New Jersey, which involved, among other things, the construction to be put upon a conveyance of land; and although the case did not turn wholly upon the language of the description in the deed, it is of sufficient interest upon the subject of *construction* to be noted.

The owner of adjoining lots in Jersey City, having a fence between them and small houses adjoining, conveyed one lot to A. and the other lot afterward to B., without referring in the deed to the fence; the beginning point in the deed to B. being the north side of South Sixth street, sixty-five feet seven and a half inches east of the north-east corner of South Sixth and Monmouth streets; and that in the deed to A. being forty-three feet nine inches east of that corner; the difference being exactly the width of A.'s lot. An experienced surveyor, accustomed to surveying in Monmouth street, located B.'s lot by running from the east line of that street as it was built upon; and fixed his west line ten inches west of the fence; and B. proceeded to build a three-story frame dwelling on his lot as thus located. A. did not interfere or give notice not to erect the building on that line until it was nearly finished, when a surveyor employed by him run a line from Monmouth street without reference to the line of the buildings thereon, by which he located the line about where the fence had been, making B.'s house ten inches over the line of B.'s lot, as he had located it. The court held that the line upon which B.'s house was erected must be held to be the true line between the lot of B. and that of A. Chancellor Zabriskie, in his opinion, said: "The line located by the complainant's surveyor, parallel to the west side of Monmouth street, and not the diagonal line fixed by the surveyor of the defendant, must be taken to be the true line of Monmouth street, as actually located. This is the only monument called for by either deed. Neither deed mentions the fence, or the houses standing on the lots, or the row of eight houses. Bentley and Smith owned both lots, and had the right

to make the division line in their sale where they pleased. They may and probably did intend to convey to each a house and lot, as they were built and fenced off. But they have expressed no such intention, but have chosen to make, and the grantees to accept, conveyances calling for the street as a monument. And it has been held by the Supreme Court that where a deed calls for the line of a street as a monument, it shall be held to mean the line as laid out, when not ascertained or acted upon" (*De Veney v. Gallagher*, 20 *N. J. Ch. R.*, 33, 38; and *vide Smith v. The State*, 3 *Zab. R.*, 130; *Den v. Van Houten*, 2 *ib.*, 61).

A case before the Supreme Court of North Carolina recently called for the construction to be put upon the following description in a deed: "Thence 57 E., 34 poles, with the ditch, to a willow stump on the bank of the ditch." The ditch at the beginning was eighteen links, and at the end, two poles wide; and the willow stump was not directly upon the bank, but upon a run which conveyed the water from the ditch. The court held the language of the description to mean through the middle of the ditch to its end, and thence down the run to the willow stump (*Cansler v. Henderson*, 64 *N. C. R.*, 469). And the same court held, at about the same time, that a description in a deed of "752 acres of land, including the land I now live on, and adjoining the same," was too vague to convey more than the lands lived on, when the grantor owned much more than 752 acres adjoining the land he lived on. It was declared that, under such circumstances, "adjoining" could not be aided by parol evidence (*Robeson v. Lewis*, 64 *N. C. R.*, 734).

In respect to lands bounded upon a water-course, the Supreme Court of the State of Texas has recently held that, in the absence of all other evidence, where the deed, in defining the boundary of the appellant's land, said "thence down the main channel of the Comal spring," etc., the thread of the stream of the Comal was the utmost limit of the rights of the appellant (*Muller v. Lander*, 31 *Tex. R.*, 265).

Two tracts of land in Missouri, conveyed to different grantees by the same grantor, lay upon opposite sides of a pond, through which a creek flowed at the time of making the deeds. Both of the deeds describing the separate tracts of land gave the boundary line dividing them as "the middle of the natural channel of the creek when the pond is exhausted." The

water in the pond was drawn off or exhausted about eighteen or nineteen years after the deeds were made. The question before the Supreme Court was as to the construction to be given to the phrase "the middle of the natural channel of the creek when the pond is exhausted;" and it was held that the phrase meant the position of the thread of the creek at the time when the pond was actually exhausted (*Mincke v. Skinner*, 44 *Mo. R.*, 92).

The Supreme Court of Maine lately had a case before it involving the interpretation of the description in a deed, wherein it appeared that the boundary of one side of a lot of land conveyed by deed was "by the new county road, leading from" a place named "to" another place named; and the original location of the road differed from that of the road as actually built and traveled. The court held that the road, as actually built and traveled, must be regarded as the boundary referred to (*Sproul v. Foye*, 55 *Maine R.*, 162). And at about the same time the same court held that courses laid down in a deed, which are repugnant to the remainder of the description, may be rejected if the remainder contains sufficient that is intelligible and consistent to uphold the deed according to the evident intention of the parties (*Beal v. Gordon*, 55 *Maine R.*, 482).

In a case before the Supreme Court of Vermont, where it appeared that the grantor in a deed, one Weeks, owned the land to and across the Vermont and Canada railroad, and the words of description were: "beginning on the west line of Vermont and Canada railroad and south-east corner of land west of said Weeks, thence south on the west line of said railroad, twenty-eight rods; thence west," etc., the court held that the intention of the parties clearly was, to bound on the west line of the railroad and not on the center line (*Maynard v. Weeks*, 41 *Vt. R.*, 617).

In a case before the Supreme Court of West Virginia, where a call for a boundary, contained in a deed, was "from the base of the hill to the back line of the survey, such course as will show 500 acres of said tract of 1,000 acres below said division line," the court held that the call for the "back line" would control the call for quantity, and that the line from the base of the hill to the back line must be a straight line (*Tomkins v. Vintroux*, 3 *W. Va. R.*, 148).

In the State of Texas, the description in a deed was the follow

ing: "Beginning at the west corner of the G. survey, thence S. 45° E. to B.'s corner; thence N. 45° E. to B.'s corner on T.'s line; thence N. 45°, W. to the south boundary line of the E. survey; thence S. 45° W. to the beginning, to include 571 acres of land; and if said point will not include enough land to make the complement 571 acres, it is to run north on said E. survey for the deficit." The Supreme Court of the State held that this description passed all the grantor's land in the G. league bounded on one side by B.'s line and on the other by T.'s line, and that what it lacked of 571 acres should be supplied from the E. league. And it was further held, that the grantee was not restricted to 571 acres, if the tract described contained more, as it did not appear that the land was sold by the acre, and there were no words expressing an intention to restrict the conveyance to exactly 571 acres (*Johnson v. Garrett*, 25 *Tex. R. [supp.]*, 13).

The Supreme Judicial Court of Massachusetts, some time since, decided that a deed of a mill and mill-dam, "with all the rights, privileges and appurtenances thereto appertaining, as mill-yard, timber, stove, iron, stream or streams, including a lot of land lying on the north side of the river and bounded on the west by the highway," did not convey any land west of the highway, and could not be shown to have that effect by evidence that the owner of the mill had been accustomed so to deposit logs for more than twenty years (*Morton v. Moore*, 15 *Gray's R.*, 573). And the same court decided in another case, where it appeared that A. conveyed to W. a lot of land "situate on the northerly side" of a certain street, and "bounded and described as follows: beginning at a point on the line of land of B.; thence by said street north fifty-eight and three-quarter degrees west, about one hundred feet, to a stake and stones at the corner of land of G.; thence north thirty-one and a quarter degrees east, to the river; thence by said B.'s land to the first-mentioned bound," that the fee of the land to the center of the street passed to W., it appearing that A. was seised thereof at the time of this conveyance (*White v. Godfrey*, 97 *Mass. R.*, 472).

In the Supreme Court of the State of Maine, in a case wherein it appeared that the last call in a deed describing the territory in township No. 21 was from an undisputed point of departure, "thence south-westerly by a line to be run between townships No.

21 and No. 22, to the place of beginning," it was held that the call repudiated all former lines between the *termini* mentioned, and that the line to be run should be the shortest distance between the points named; and that a subsequent clause "according to a survey and plan of said township by P. and D.," could not control or modify the preceding language. And the court accordingly held that an instruction to the jury that another line, admitted to have been made by the proprietors prior to the date of the deed to the plaintiffs, purporting to be the true line between townships 21 and 22, was the controlling monument answering the call, and that the point of departure must be rejected as inconsistent with the other and superior monument referred to in the deed, was erroneous. (*Grant v. Black*, 53 *Maine R.*, 557).

Where a description in a deed was as follows: "A part of fractional section number 19, being the half of the west half of the north-west quarter of section number 29, in township 7, south, of range 14, west, containing 40 acres," the Supreme Court of Indiana held that, rejecting the words "a part of fractional section number 19," as contradicting a more particular description following, the conveyance was good to pass an undivided half of the west half of the north-west quarter of the section referred to; applying the rule of construction, that words of particular description will control more general terms of description where both cannot stand together (*Gano v. Aldridge*, 27 *Ind. R.*, 294).

The Supreme Court of Maine decided that, where land was described in a deed as beginning at a stake and stones and the corner of the grantor's land, thence running in a certain direction on the grantor's land and A. D.'s line, the true corner of the grantor's land, if established, was the point of beginning; and that parol evidence that the stake and stones were in another place was not admissible; and, further, that the true line between the grantor and A. D. was the true boundary on that side. And it was declared by the court that it was not material that the grantor and former owner of the land adjacent had occupied to the stake and stones for ten years, or that, before conveying, the plaintiff, defendant and a surveyor established the stake, etc., as monuments and bounds, and the defendant supposed them to be the true bounds when he took the deed (*Wiswell v. Marston*, 54 *Maine R.*, 270). And the same court held, at the same term, where the owner of land, and a street running through, conveyed

all the land south of the southerly line of said street to "A.," and at the same time conveyed to "B." all the land north of the southerly line of said street, that the fee in the land covered by the street passed to "B." And it was further held that words in the deed to A.'s grantor, "with the buildings thereon," *ad habendum*, "above granted premises, with privileges and appurtenances thereto belonging," did not pass the fee to any portion of the land north of the southerly line of the street (*Warren v. Blake*, 54 *Maine R.*, 276).

A deed of land in Massachusetts, in describing the granted premises, after naming a certain monument, added, "thence running southerly by land improved by A. to the road;" and it appeared that a straight line to the road, running a little east of south, would include the land improved by A. in the granted premises; while a line running a little south of west to the corner of the land improved by A., and thence along the line of said land a little east of south to the road, at a point nearly south of the monument, would exclude said land from the granted premises. The Supreme Judicial Court of the State held that the latter construction was to be adopted as the true one; and the court declared that, where a description in a deed is clear and unambiguous, the court will put a construction upon the terms used, and will not receive parol evidence to show the intention of the parties and control its legal effect. And, further, that where any part of the description in a deed is inconsistent with the rest, and thus shown to be erroneous, it will be rejected by the court (*Bond v. Fay*, 12 *Allen's R.*, 86).

Where a boundary line in a deed of land in California was described as commencing at a tree, and "thence running easterly parallel with the southern line of said Antelope ranch, according to the survey of the same made by the United States Surveyor-General for said State, to said Antelope creek," the Supreme Court of the State held that the language was not ambiguous; and that evidence *aliunde* was not admissible to show that a straight line, following the general course of the southern boundary, was intended. And it was further held that the southern line of Antelope ranch referred to, being a broken line, and there being no monument referred to at which the line would terminate, the boundary would run parallel with the broken line, and not straight and parallel with its general course (*Pratt v. Woodward*, 32 *Cal. R.*, 219).

In settlement of a dispute between M. and P. as to the title to a tract of land in Ohio, P. conveyed a part thereof containing 325 acres to M.; and two months later M. conveyed to P. a tract which, by the distances given, included part of the land conveyed by P. to M., but was described as bounded by "the tract of 325 acres of said M." The Supreme Court of the State, before whom the deeds came for construction, held that the deeds were to be construed together, and that the measurements should be rejected, and the line established by the first deed and referred to by the second should be adopted (*Calhoun v. Price*, 17 *Ohio St. R.*, 96).

In a somewhat recent case before the Supreme Court of Vermont, where the description in a deed read "east 15 degrees south on said L.'s line," and it was found that L.'s line ran east $13\frac{3}{4}$ degrees south, it was held that "on said L.'s line" was the controlling description. The variance in the courses between the description in the deed and the actual fact was deemed immaterial, and was disregarded (*Park v. Pratt*, 38 *Vt. C.*, 545).

A description of lands in the State of New Jersey was given in the deed as beginning "on the south-west side of" a certain highway, and there were no other words in the conveyance to show the intent of the parties; the courts of the State held that the description excluded the highway, that is, that no part of the highway passed by the deed (*Hoboken Land, etc., Company v. Kerrigan*, 2 *Vroom's R.*, 13). And the Supreme Court of the State of Wisconsin has recently declared that, where a highway or river is named in a deed as a boundary of land conveyed, the center of such highway or river is to be understood, unless there are express words limiting the boundary to the bank of the river or the side of the highway; but that, where there is a known and well-ascertained place of beginning in the description in a deed, that must govern, and the grant must be confined within the boundaries given. The case before the court was this: Where there was a road three rods wide along the northern line of a section, and one four rods wide along the western line (the section line in each case being the center of the road), land conveyed by a deed was described therein as "commencing on the road at the north-west corner" of said section, "thence south on the road" running along the west side of said section, "sixteen rods; thence, at right angles with said road, and parallel with the north line of said section, twenty rods to a stake; thence, at right angles, and

parallel with the west line of said section, to the road" on the north side of the section; "thence west, along the line of said road, twenty rods, to the place of beginning, containing two acres;" by actual survey it appeared that the stake mentioned in the deed was twenty-two rods east of the west line, and seventeen and a half rods south of the north line of said section. The court held that in determining the land conveyed by the deed it was necessary to commence with the intersection of the center lines of said roads, which was the north-west corner of the section—to follow the center line of the west road sixteen rods; to follow a direct line to said stake; thence a line parallel with the west section line to the center of the road on the north; and thence along the center of said road to the place of beginning. And the court declared, in deciding the case, that, in construing the description of land in a deed of conveyance, a section corner mentioned therein will control courses and distances (*Gove v. White*, 20 Wis. R., 425).

CHAPTER XIV.

FURTHER CASES PASSED UPON BY THE COURTS, GIVING CONSTRUCTION TO PARTICULAR CONVEYANCES IN RESPECT TO BOUNDARY—CASES MISCELLANEOUSLY STATED.

THERE are still other cases which have been passed upon by the courts, involving the interpretation of the language of particular conveyances in respect to the boundary of lands, and which may very properly be considered.

An important case came before the Supreme Court of the State of Maine a few years since, wherein it was held that the line of a parcel of land, to run parallel with and at a specified distance from the south side of a building, should be measured from the corner-board of that side, and not from the outer edge of the eaves (*Proprietors of Center St. Church v. Machias Hotel Company*, 51 Maine R., 413). This establishes a principle of construction which may often be applied, and the doctrine of the case is doubtless correct. If the boundary was the side of the building, over which the eaves projected, probably the courts would hold that the parties intended the outer edge of the eaves to be the line

The same court held, about the same time, that the word "from" an object, or "to" an object used in a deed excludes the terminus referred to. To illustrate; the case in the deed was expressed as follows: "Thence easterly, about thirty-five feet, to land now or formerly owned by I. B.; thence by I. B.'s land," etc.; and previously thereto, the grantor in such deed had conveyed to I. B., by deed of warranty, not recorded, a two-foot strip of land off from the side of his land adjoining I. B.'s land; and it was held that it would not be presumed that the grantor intended fraud upon his prior grantee, and the description was held to exclude the two-foot strip; I. B. not owning it the less because his deed was unrecorded (*Bonney v. Morrill*, 52 *Maine R.*, 252).

The Supreme Judicial Court of Massachusetts has held that a deed of land bounded "easterly by said thirty-foot street by a line which is parallel with and 190 feet distant from B. street," B. street being 160 feet eastwardly from the thirty-foot street, conveyed no part of that street (*Bruinard v. Boston, etc., R. R. Co.*, 12 *Gray's R.*, 407). And the same court has since held that a point of land, described in a deed as being "five rods due south of B.'s south-east corner bound," was to be located by measurement from the south-east corner of the land actually owned by B., when such corner was different from the corner of land occupied by him (*Wellfleet v. Truro*, 9 *Allen's R.*, 137).

The Supreme Court of Delaware, in a case before it involving the construction of a conveyance, held that the words in a deed, "together with all and singular the mill, house, mill-dam, races, flood-gates, mill-wheels, stones, hoppers, bolting charts and cloths, waters, water-courses, and other appurtenances," did not pass the title to the bed of the mill-pond (*Bartholomew v. Edwards*, 1 *Houston's R.*, 17).

Where a description of lands in a mortgage deed was in the words "the south-west quarter of section 31, etc., and also the following tract adjoining the above-described tract on the west; to wit, forty rods in width off of the east side of the north-east quarter of section 36, etc., which said tract extends forty rods in width as aforesaid, and from the north line to the south line of said last-mentioned quarter-section;" the Supreme Court of Indiana, before whom the conveyance came for interpretation, held that the tract forty rods wide was conveyed which adjoined the first-mentioned section on the west, and disregarded the other

description, where the tract forty feet wide off of the east part of the north-east quarter of section 36 did not adjoin said south-west quarter of section 31 on the west (*Gray v. Stien*, 24 *Ind. R.*, 174).

The Supreme Court of Georgia decided that a deed of land describing the granted premises as "lying and being on the west side" of a river which was not navigable, conveyed the title to an island in the river, which was situate west of the main channel (*Stanford v. Mangin*, 30 *Geo. R.*, 355). In this case the general doctrine in cases of land bounded generally upon an unnavigable river or stream was applied, although the language of the description was somewhat different from the other cases referred to wherein the doctrine has been applied.

The Supreme Court of Pennsylvania held, in a case where it appeared that a portion of land, on the bank of a navigable river, was marked in the town plan as "a beach," and dedicated to public use, and certain lots thereon were conveyed by deeds, which called for the "beach of the river" as one of their boundaries, that in construing other deeds for lots, which in terms were bounded by "the river," they were to be so far controlled by the town plan as to fix the "beach," and not the river, as the real and proper boundary; and in the same case the general rule was laid down, that where a map or town plan, made by the proprietor of lands on which a town is located, is referred to in a deed by the proprietor, for one or more of the town lots, it becomes a material and essential part of the conveyance, and has the same force and effect as if incorporated into the deed (*Birmingham v. Anderson*, 48 *Penn. R.*, 253).

Some very important principles in respect to boundary were recently settled by the Supreme Court of the United States. In the case before the court, it appeared that a proprietor who had dedicated a street to the public use, without granting the fee, conveyed a lot bounded on the street, and the street was bounded on the opposite side by Lake Michigan. The court held that the grantee took the fee to the center of the street upon the side adjoining the land conveyed, subject to the right of way. But, as to the side of the street bounded on the lake, the grantee took nothing by his deed beyond the center, while the fee of the half bounded by the lake remained in the proprietor, subject to the easement. And it was further held that, where a lake boundary so limits a street as to reduce it to less than half its regular width,

the street so reduced must still be divided by its center line between the grantee of the lot bounded by it and the original proprietor; and further, that accretion, by alluvion, upon a street reduced by a lake boundary to less than half its regular width, belongs to the original proprietor of the lot; in whom, subject to the public easement, the fee of the half of the lake remains. The decision of the case involved these several questions, and they were carefully examined by Chief Justice Chase, who gave the opinion of the court, and were settled as above stated (*Banks v. Ogden*, 2 Wall. R., 57).

Another important case was disposed of by the same court, at the same term, involving principles which are important to be noted. The conveyance before the court for interpretation was of a division or branch of a canal, "including its *banks, margins, tow-paths, side-cuts, feeders, basins, right of way, dams, water-power, structures*, and all the appurtenances thereunto belonging." The court held that adjoining parcels of land belonging to the grantor, which were necessary to the use of the canal and water-power, and were used with it at the time, but which could not be included in any of the terms above, in italics, passed by the conveyance. The opinion of the court was delivered by Mr. Justice Field, and, as he gives very clear reasons for the ruling, and refers to authorities upon the point, it may be well to give an extract from his opinion. He says: "The objection that the deed does not cover the premises in controversy rests upon the fact that it does not convey the parcels of land, for which the action is brought, by specific designation and description. Such designation and description, though usual, are not always essential. Land will often pass by other terms. Thus, a grant of a messuage, or a messuage with the appurtenances, will carry the dwelling-house and adjoining buildings; and also its orchard, garden and curtilage (*Shepard's Touchstone*, 94). The true rule on the subject is this: that everything essential to the beneficial use and enjoyment of the property designated is, in the absence of language indicating a different intention on the part of the grantor, to be considered as passing by the conveyance (*Sparks v. Hess*, 15 California, 196). Thus, the devise of a mill and its appurtenances was held by Mr. Justice Story to pass to the devisee not merely the building, but all the land under the mill and necessary for its use, and commonly used with it (*Whitney v. Olney*, 3 Mason, 280). So a convey-

ance 'of a certain tenement, being one-half of a corn-mill, situated' on a designated lot, 'with all the privileges and appurtenances,' was held by the Supreme Court of New Hampshire to pass not only the mill, but the land on which it was situated, together with such portion of the water privilege as was essential to its use (*Gilson v. Brockway*, 8 *New Hampshire*, 465). And the exception of a factory from a mortgage deed was held, by the Supreme Court of Massachusetts, to extend to the land under the factory, and the water privilege appurtenant thereto. See, also, to the same effect, *Wise v. Wheeler* (6 *Iredell*, 196); and *Blaine's Lessees v. Chambers* (1 *Sergeant & Rawle*, 169). * * * This language is comprehensive enough to carry the several parcels of land described in the declaration" (*Shuts v. Selden's Lessee*, 2 *Wall. R.*, 177, 187, 188). It was ably argued by counsel in this case that the court could not hold that the deed carried the land in question, except by holding that it passed by the word "appurtenances;" but it does not appear that the decision was placed upon that view. Reference was made by counsel to the well-settled doctrine "that lands will not pass by the word appurtenances;" and then he proceeded: "To insist that the particular tracts described in the lease are *appurtenant* to some one or more of the things sold by the State would be even more absurd than to maintain that *land* can be *appurtenant to land*. It would be maintaining that land can be appurtenant to a mere easement, a right of way, a water-power, or a stream of water, natural or artificial. The lands demised cannot be '*appurtenant*' to the *bed of the canal*, nor to its *banks*, nor its *basins*, nor its *tow-paths*, nor its *side-cuts*, nor its *feeders*, nor its *basins*, nor the *right of way*, nor the *dams*, nor the *water-power*, nor the *structures*, specified in the act." This reasoning is very good if it was pertinent to the case in hand. But the court was of the opinion that the parcels of land in question passed by the deed, and the reasons are assigned in the extract from the opinion above quoted.

A case was decided by the Supreme Court of Maine, wherein it appeared that A. conveyed to B. a portion of a lot of land of a certain width, and extending so far in length "as will make precisely twenty acres;" and immediately afterward A. and B., by mutual agreement and survey, marked the lines and curves of the granted premises by spotted trees and stakes. The next year A. conveyed to C. the remainder of the lot, more or less, bounding

it on the east "by the west line of B.'s land." B. and C. occupied their several parcels, according to the line marked by A. and B., for about twenty-five years. In the mean time B., by the decision of a lawsuit between him and a third party, had his lot widened on one side four rods, and, in consequence, relinquished two rods on the other side. C., without any suit, conformed his lines to B.'s new ones. But the division line between B. and C., and their occupation of their respective parcels, continued as before. In an action, brought by C.'s grantee, to recover of B.'s grantee all of the original lot except twenty acres, the court held that the parties intended, in the conveyance from A. to C., to bound the land conveyed by the well-known marked line then existing, and not by an imaginary west line of B.'s land, to include therein "precisely twenty acres" (*Fought v. Holway*, 50 *Maine R.*, 24). And the same court, in giving construction to a deed conveying a grist-mill, with the land and privileges, where it was situated, "necessary for and attached to said grist-mill, hereby meaning to convey all the lands and mill privilege (not heretofore sold by us) on the farm connected with said grist-mill and privilege," held that the effect of the deed was to convey all the land and privilege not before sold by the grantor, and connected with the mill and privilege, and not merely what was strictly necessary for and attached to the mill. But it was said that if the parties had, by their acts and occupation, treated the grant as embracing not all the lands and privilege on the dam not previously sold, but all the lands and privilege connected with the grist-mill not previously sold, the court would not interfere to control their construction (*Esty v. Baker*, 50 *Maine R.*, 325).

The Supreme Court of Vermont has held that a deed which described the land conveyed as "lots No. 22 and 23, in the second division of lots in said Chelsea, and is all and the same land which we now occupy and improve as our home-farm," passed the whole of the land occupied as "our home-farm," although a part of it was not included in said lots No. 22 and 23 (*Spiller v. Scribner*, 36 *Vt. R.*, 245).

The Supreme Judicial Court of Massachusetts disposed of a case in which the construction of a deed of land was involved, where the deed, in describing the granted premises, after naming a certain monument, added: "thence running southerly by land improved by A. to the road," and it appeared that a straight line to

the road, running a little east of south, would include the land improved by A. in the granted premises, while a line running a little south of west, to the corner of the land improved by A., and thence along the line of said land a little east of south to the road, at a point nearly south of the monument, would exclude said land from the granted premises. The court held that the latter construction was to be adopted as the true one, and the case was accordingly decided upon that view (*Bond v. Fay*, 8 *Allen's R.*, 212). And the same distinguished court disposed of another case at the same term, which involved the rights of a grantee in a deed depending entirely upon the proper construction to be put upon the conveyance. The deed was for a certain lot of land, with a store thereon, "together with all the rights, easements, privileges and appurtenances thereto belonging, and now enjoyed therewith; being the same premises which A. B. conveyed to me." The question arose upon the words quoted, and the court held that the deed did not include a lot of land in the rear of the described premises, which was not conveyed by A. B. to the grantor, although it appeared that the grantor owned the same, and had built thereon a store, connected with the store on the described premises by a covered bridge, and had agreed with the owners of adjoining lots that such rear store should not be rented or occupied by any person, except the owner or occupants of the front store, as an appendage to the same, and that no building should ever be erected upon such rear lot, except of a specified height. Chapman, J., delivered the opinion of the court, in the course of which he enunciated principles and referred to authorities which are important to note. He says: "The last clause excludes the demanded premises; for it is conceded that the deed of Dwight and others did not include them. If, therefore, they passed by the mortgage, it must be under the clause granting all the 'rights, easements, privileges and appurtenances thereto belonging, and now had and used and enjoyed therewith.' The question arising in this case is, whether the premises were conveyed by these words. All these words have a well-defined legal signification. The word 'rights,' as applied to property, refers to the free use, enjoyment and disposal of it (1 *Bl. Com.*, 138). It also includes the estate *in esse* in conveyances (*Co. Litt.*, 345 *b.*). It is often included in the word 'title,' which is the more general word (*Id.*). Such being its definition, it cannot be construed to

include an additional tract of land. The next word used is 'easements,' and it is contended that the fee of land passes by this word. If the demanded premises are included, it must be by virtue of the phrase 'privileges and appurtenances.' The last word is the one relied on by the tenants. It is conceded that generally one tract of land cannot pass as an appurtenance to another tract. This point is discussed in *Leonard v. White* (7 Mass., 6). And in *Tyler v. Hammond* (11 Pick., 124), Wilde, J., says it is well settled that land cannot pass as appurtenant to land. The technical signification of the word 'appurtenances' is not large enough to include a distinct parcel of land, which is not described in the deed. In construing a deed, the courts seek to ascertain the intention of the grantor, and construe his language most strongly against himself; but the intention is to be gathered from the language of the instrument, and the words he uses are to be taken in their usual legal signification, unless it appears from the connection in which they are used that he has attached a different meaning to them. It has accordingly been held that, in a devise, land may pass under the word 'appurtenances,' the intention of the testator being gathered from all parts of his will, and from his own habits in respect to the use of the property (*Otis v. Smith*, 9 Pick., 923). The courts seem to regard a will as different from a deed. It is so in two respects: 1 A testator is not presumed to use language as accurately as a grantor; 2. A will is presumed to dispose of all the estate of the testator, and, if there is no other disposition of the fee of that which is given as an appurtenance, a presumption is raised that the word was intended to include the fee.

"But it is also true that, in a grant, the words will be construed according to the intent of the parties as manifested by the whole instrument, and the word 'appurtenances' is subject to this rule of construction; so that, if it is apparent to the court that the grantee used it to express an idea different from its technical signification, they will construe it accordingly (*Whitney v. Olney*, 3 Mason, 280, and cases cited; 2 Washburn on Real Prop., 627). In *Hill v. West* (4 Yeates, 142) this principle of interpretation was carried so far, in respect to a deed made in 1704, that city lots, laid out under Penn's survey in the Liberties of Philadelphia, were held to pass as appurtenant to a large tract of land in the county at a considerable distance from them. But the case was peculiar, and is valuable only as an extreme illustration. Where

it is not clear that a grantor used a technical word in an unusual sense, it is just toward all parties to presume that he used it in its ordinary and technical sense.

“It is held that flats may pass, in the partition of real estate by commissioners, under the phrase ‘a wharf and dock, with all the privileges and appurtenances thereto belonging’ (*Doane v. Broad Street Association*, 6 *Mass.*, 332). But the court did not regard the wharf as land, but as a structure erected on the land; so that land might pass with it as appurtenant to it, on the same ground that it will pass with a mill or messuage. In that case it was clear, from the return of the commissioners, that they intended to assign the flats with the wharf. In *Ashley v. Eastern Railroad* (5 *Met.*, 368) a deed of a wharf is held to convey the adjoining flats as appurtenant. But in all these cases the land passes with the thing described as parcel rather than appurtenant (2 *Washburn on Real Prop.*, 627). The deed of mortgage conveys the land with the new store thereon; and it is necessary to consider whether the store on the land mortgaged was so connected with the store on the demanded premises that it can be regarded as parcel of it, and to pass together with the land on which it stood. * * * The fact that the back store could not be approached for ordinary use, except through the front store, has some tendency to show that he intended to convey both. But this fact is not sufficient to control the language of the deed; especially as he had provided a passage-way to the back store independently of the front store, though the purposes for which he might approach it and occupy it were very limited. Such a restriction upon its use may affect its value, but that consideration is not very important in construing the deed. There is nothing, either in the words of the instrument or the situation of the property, to control the express declaration that the property conveyed by the mortgage was the same that Messrs. Dwight and others conveyed to him” (*Ammidown v. Granite Bank*, 8 *Allen’s R.*, 285, 290–293). But the same distinguished court held, at the same term, that a deed of a certain described lot of land, “together with all the dwelling-house and building, with the appurtenances, situate thereon or thereto belonging; to have and to hold the above granted premises, with the privileges and appurtenances thereto belonging,” included a small lot of land adjoining the granted premises, which was

habitually used with the dwelling-house, and was reasonably necessary to be held in connection with it. Chapman, J., also delivered the opinion of the court in this case, and said: "We must apply to this deed the well-established rule of construction stated in *Salisbury v. Andrews* (19 *Pick.*, 253), that every word shall be presumed to have been used for some purpose, and shall have some force and effect if it can. According to the strict technical signification of the word, land cannot be appurtenant to a bank. But where a bank is conveyed with its 'appurtenances,' the word must refer to land if it have any meaning; and the grantor must have used it to indicate land. The older authorities on this subject are collated in *Smith v. Martin* (2 *Saund.*, 400, *note*); and they hold that at least the garden, curtilage and close adjoining the house will pass. Strictly, they pass as parcel of the house. The modern authorities are at least no more strict in their definitions of the word appurtenances than the more ancient ones. Such being the rule of construction, it must be held that the demanded premises passed with the house; for they consisted of a small close or curtilage adjoining it, prepared with considerable pains to be used with it, habitually used with it, and reasonably necessary to be held in connection with it and with the passage in the rear, which was appurtenant to the estate" (*Ammidown v. Ball*, 8 *Allen's R.*, 293, 295).

A case recently came before the Supreme Court of North Carolina, turning upon the proper construction to be put upon the language in a conveyance. The beginning corner of the deed was on a private avenue, and the other calls of the deed came back to the mouth of the avenue, and "thence down the said avenue to the beginning, reserving forever twenty feet for my avenue." The court held that this reservation explained the meaning of the grantor to be to run to the middle of the avenue, and thence down it in the middle to a point opposite the beginning; thence to the beginning (*Hayes v. Askew*, 8 *Jones Law R.*, 226). And the same court held that, where the second call of a boundary is clearly established, the first may be ascertained by running the course reversed, and measuring on it the distance called for. In the deed before the court a white — was called for as a corner, and a white-oak was pointed out nearly in the course, by a marked line leading to it; and there were other circumstances going to show that this white-oak was the white —

called for as the corner. The court held that it was a proper question to leave to the jury, whether the white-oak was, in fact, the corner intended (*Dobson v. Finley*, 8 *Jones Law R.*, 495).

A case was lately decided by the Supreme Court of California, where the deed described the land conveyed as one league in amount, and bounded on one side by a stream not navigable; on the second side by a line starting from the river, in the direction of a line directly crossing the line of the river; on the third side, by a line that ran one league parallel with the river; and on the fourth side by a line that ran parallel with the line on the second side. The court held that the first line was to follow the meanderings of the river until a point in the river was reached one league distant, when reduced to a straight line, from the point of beginning; that the second and fourth lines were to run parallel with each other, at right angles with such straight line, and that the third line was to run parallel with the river in all its meanderings (*Hicks v. Coleman*, 25 *Cal. R.*, 122). And the same court disposed of another case, wherein it appeared that a deed conveyed nine leagues of land, commencing at a point on a certain river, "two leagues in length along said river below a point on the same made by the intersection with the river of the lower or southerly boundary line of a tract of land on said river known as the rancho of Larkin's children; thence running southerly (its eastern boundary for the whole length being said river) nine leagues, more or less," etc., reciting that the whole of the B. grant was intended to be conveyed, "with the exception of a tract of two leagues in length, along and with said river, on the upper or northerly part of said" B. grant. The court held that the two leagues along the river should be measured in a straight line, and not by following the meanderings of the river (*Kimball v. Semple*, 25 *Cal. R.*, 440).

A case lately came before the Supreme Court of Missouri calling for the interpretation of a conveyance of land. A deed from A. described the land as "the upper half tract of land purchased by A. from C.," "which tract of land now intended to be granted shall contain 315 arpents, to be bounded — north by the Missouri river, west by land of S., south by land of J., and east or on the lower side by a line to be run parallel to the lower line of the tract of 630 arpents bought of C., and which line is hereafter to be run, and is to divide the land now granted from the land of

A." The tract contained more than 630 arpents. The court held that the deed conveyed one-half of the tract, to be bounded by the line to be run. And the court also declared that known and fixed monuments will control courses and distances given in a deed, and metes and bounds will include the lands within them, though the quantity varies from that expressed, unless it can be gathered from the whole deed that it was clearly the intent of the grantor to give only a definite quantity (*Evans's Administrator v. Temple*, 35 Mo. R., 494).

In a case before the Supreme Judicial Court of Massachusetts, it appeared that A. conveyed to B. a lot of land bounded "south on a passage-way twenty feet wide;" "also, such rights on the beach, lying directly between the passage-way and the sea, as were" conveyed to the grantee by F., by deed which passed the beach as appurtenant. B. conveyed to C. this lot, describing it as "bounded south-easterly on a passage-way," and as "entitled to the privilege mentioned in a deed from F. to A., to which reference for further particulars may be had." The court held that the beach passed under both deeds (*Cook v. Farrington*, 10 Gray's R., 70). And in the same court, at a later term, a case was decided in which the premises granted in the deed before the court were described as beginning on a street; thence running north ten rods nineteen links; thence east 122 feet to the southerly corner of land of A. B.; thence running south ten rods to the street; and thence to the place of beginning. This description was erroneous. The southerly corner of A. B.'s land was only seven rods from the street; in order to reach that corner by the courses described, the first line should have been but seven rods and nineteen links in length; and the first and second lines, if run out according to the courses and distances given, would include A. B.'s land, leading to his northerly corner, which was three rods from his southerly corner. The court held that the reference to A. B.'s southerly corner must prevail, and that the distances mentioned in the first and third lines must be rejected (*George v. Wood*, 7 Allen's R., 14).

An interesting case came before the Supreme Court of Vermont, not many years since, involving the boundaries of several parcels of land described in a deed. One piece of land was described as follows: "Beginning on the west side of the road at the end of a wall, running westerly on said wall and in a straight

line therewith to the west line of lot No. 3; thence on said west line to the center line of said lot No. 3; thence on said center line to the road; thence on said road to the place of beginning." The court held that the west line of the land extended to the middle of the highway.

Another piece was described as follows: "On the south side of the road opposite to the last-mentioned piece fenced on two sides, being a ridge of land lying between said road and the center line of lot No. 3, to extend so far east as to make just five acres." The court held that the line extended to the middle of the highway. And another piece was described as follows: "Opposite to the last-mentioned piece on the east side of said road, within the fences or wall." The court held that inasmuch as it in fact was bounded on the highway, though not so described, taken in connection with the fact that the three pieces were all conveyed together, it must be deemed to have been the intention of the grantor to convey to the middle of the highway. The court declared the rule in the case, that where land is bounded "upon," "on" or "along" a highway, the presumption is that the line extends to the middle of the highway. And that if the language of a deed, describing land conveyed bounded upon a highway, leaves it doubtful whether the grantor intended the line to be in the center or on the side of the highway, the boundary will be construed to be the center of the road (*Marsh v. Burt*, 34 *Vt. R.*, 289).

CHAPTER XV.

FURTHER CASES PASSED UPON BY THE COURTS, GIVING CONSTRUCTION TO PARTICULAR CONVEYANCES IN RESPECT TO BOUNDARY — SOME CASES, BOTH ENGLISH AND AMERICAN — CASES MISCELLANEOUSLY STATED.

THERE are still further cases proper to be referred to upon the subject of the last preceding chapters, English as well as American. To begin with a case before the English courts. A conveyance by the lord of part of the demesne of the manor described the land as "all that piece of meadow ground commonly known by the name of Chamberlain's field, containing, by estimation,

2 a., 3 r., 35 p., be the same more or less, and abutting towards the west on Hall lane." The deed also contained the following general words: "Together with all ways, etc., and appurtenances to the said messuage, etc., lands, etc., belonging, or therewith used, possessed, occupied, etc." Upon a special case it appeared, before the Court of Common Pleas, that the grantee of Chamberlain's field, and those claiming under him, had for sixty years used a small strip of land, lying between the field and Hall lane, as a place of deposit for manure; that about the year 1841 the then owner cut and converted to his own use a tree which grew thereon, and that in 1843 he inclosed the strip. On the other hand there was evidence that the lord of the manor had, both before and since the date of the conveyance, exercised various acts of ownership by making grants thereof, and giving to the owners of the adjoining lands licenses to inclose, over other similar strips of land by the roadside, in other parts of the manor, the nearest of which was about three-quarters of a mile distant from the spot in question. The court held that the conveyance of Chamberlain's field was sufficient to pass to the grantee the slip of land beyond the fence, and the soil to the center of Hall lane adjoining. And the court held, also, that, assuming the language of the deed to be doubtful or ambiguous, the evidence of user by the grantor and those claiming under him was sufficient to outweigh the presumption in favor of the lord, arising from the acts of ownership by him on other parts of the waste of the manor similarly situated (*Simpson v. Dendy*, 8 Com. Bench R., N. S., 433). And the same case came before the Exchequer Chamber in error, where the judgment of the Court of Common Bench was affirmed; the former court holding that strips of land lying along a highway, though indirectly connected with parts of the waste, may well pass, under a conveyance of the adjacent inclosure, though the deed purported to state the quantity of acres within the fences that were therein passed, if it had the words "more or less" added; Pollock, Ch. B., stating, however: "This is much more a matter of fact than of law. I doubt very much whether there can be an appeal on a matter of fact; and, at any rate, unless there is something very strong to the contrary, we ought to affirm the verdict for Simpson. We are, therefore, all of opinion that the judgment of the court below must be affirmed" (*Dendy v.*

Simpson, 10 *Com. Bench R.*, *N. S.*, 883; *S. C.*, 7 *Jur.*, *N. S.*, 1058).

The Supreme Judicial Court of Massachusetts has decided that a conveyance of land, "beginning at an angle in the stone wall on the easterly side of the aforesaid road;" thence running around the rear of the lot granted "to a stake and stones at the aforesaid road; thence northerly on the line of said road to the first mentioned bound," excluded the road (*Smith v. Slocumb*, 9 *Gray's R.*, 36). But the same court held that a deed of land, bounded "westerly by P.'s mill-pond," which had been artificially created by erecting a dam across a stream, and through which the thread of the stream had always been apparent, passed the land to the thread of the stream (*Phinney v. Watts*, 9 *Gray's R.*, 269). The same court decided another interesting case, which is reported in the same volume, and which involved the construction of a deed of land. The land conveyed was described in the deed; after an accurate description of its boundaries from its northern extremity around its western and southern sides to a point on the east at the K. road; "thence turning and running northerly, bounding easterly by said road until it comes to land of B.; thence turning and running westerly by land of said B. until it comes to the south-easterly corner of an acre lot" included in the land conveyed; "thence turning and running northerly, bounding easterly by said B.'s land to the W. road; thence turning and running westerly, bounding northerly by said road to the place of beginning." It appeared that the K. road extended north-eastwardly until it joined the W. road, which ran from north-east to south-west. On the south-westerly side of the W. road, between that junction and the point of beginning of the description, were three lots, equal in depth; the widest known as the L. lot; next the K. road; then a lot of B., and then the acre lot. B. owned all the land abutting on the opposite side of this part of the W. road. The deed referred to the grantor's sources of title, and to a plan, none of which included the L. lot. The court held that the description by metes and bounds was an impossible one; and that the L. lot did not pass by the deed (*Ide v. Pearce*, 9 *Gray's R.*, 350). And the same court held in another case that, where a boundary line in a deed is described as beginning at a post, and running "thence southerly in as straight a line as possible over the highest part of said hill, to a large white-pine tree," the method

of ascertaining the boundary is to run a straight line from the post to the highest part of the hill, and another straight line from the highest part of the hill to the tree (*Hovey v. Sawyer*, 5 *Allen's R.*, 554).

The Supreme Court of Mississippi decided a case depending upon the construction of a conveyance of land, where the deed called to commence at a point in the grantor's northern boundary line, and to run on that a given course and distance; and the court held that the true northerly line must be taken, although the grantor may have had a survey made on the ground, the courses and distances of which survey were set forth in the deed, and the northern line of such survey differed entirely from the true northern line of the tract (*Manter v. Picot*, 33 *Miss. R.*, 490). In a case before the Supreme Judicial Court of Massachusetts, it appeared that in a deed of a parcel of land 115 feet wide, the grantors "reserved to themselves a common right in a passage-way fifteen feet, running east and west through the center of said parcel, and dividing said parcel into two lots of fifty feet each." The grantor conveyed to A. the northern lot, "bounded southerly by a passage-way fifteen feet wide;" and afterward conveyed to B. the southern lot, "bounded northerly on a passage-way fifteen feet wide; together with my right in common in said passage-way of fifteen feet;" and B., under an order of court to convey all his estate in the premises, conveyed the southerly lot, bounded "northerly by" said "passage-way." The court held that B. retained no right in the soil of the passage-way (*Winslow v. King*, 14 *Gray's R.*, 321).

A case of some interest came before the Supreme Court of Rhode Island, a few years since, involving the construction to be given to a certain term used in a deed of land; and it was held that the term "Great Hill or Ledge of Lime Rock," in a deed, is to be construed, in order to ascertain its extent and limits, in the light of the circumstances attending the transaction, according to the intent of the parties, derived from the language employed by them, rather than according to geological notions, however correct, concerning the continuity and extent of the stratum of lime at the place referred to; and where the hill or ledge was described in the deed as "lying southerly from my dwelling-house," and another ledge was described in the same deed as "lying easterly from said dwelling-house, and northerly from the driftway leading

from said Great Ledge to the lime-kilns," the court decided that the limits thus implied were to be observed, irrespective of the continuity and extent of the stratum of lime (*Dexter, etc., Company v. Dexter*, 6 *Rhode Island R.*, 353).

A deed of land in California conveyed "all that portion of the Union Ranch lying south of two oak trees marked E. X. C." The Supreme Court of the State held that these trees marked a line of boundary, and that only that portion of the ranch lying south of the line extending between the trees was conveyed by the deed (*Chapman v. Excelsior, etc., Company*, 17 *Cal. R.*, 231).

A description of land in a deed in Wisconsin ran: "As a part of the east half of the south-west quarter of section 5, township 3, range 8, beginning on the south line of said section 5, on the east side of the bottom land of the creek, far enough up the bank to raise a nine-foot head to a mill standing by the bridge on section 8; thence up the bottom land 100 rods, to include all the bottom land on both sides of the creek within the above-mentioned bounds, etc." The Supreme Court of the State held that the intention was to convey all the low lands on either side of the creek, for the distance of 100 rods up the same from the place of beginning, which would be flowed by such head of water; but that the "nine-foot head clause" did not grant to the vendees any right to flow the lands of the vendor above the 100 rods specified in the deed (*Coats v. Taft*, 12 *Wis. R.*, 388). And in another case before the same court, it appeared that the original proprietors of the present city of Milwaukee sold lands, in accordance with a recorded town plat, and which extended from a street to what was then a bayou or branch of the Milwaukee river, running parallel with it and partially navigable. Running by the side of this bayou, and in part extending over it, was a street called River street, and beyond that, other lots extending from the west line of this street to the main river. Subsequently this bayou, having become a nuisance, was filled up by order of the city authorities. In an action of ejectment for this land so filled up, the court held that the proprietors intended to convey all their interest in the bayou and in the street in a manner the most beneficial to the abutters. And the court further held that, in view of the existence of the two highways running side by side, the reasonable construction of the grants was to make the line of the street adjoining the bayou the dividing line, up to which line the fee

passed to the respective abutments on the one and the other side of it (*Mariner v. Schulte*, 13 Wis. R., 692).

The Supreme Court of California decided that an agreement for the sale or conveyance of a "bridge, toll-house, stable and outhouses, with all the privileges and appurtenances appertaining and in anywise belonging to said bridge," passed the land upon which the bridge stood, and all that was necessary to its beneficial use and enjoyment (*Sparks v. Hess*, 15 Cal. R., 186).

An interesting case was disposed of by the Supreme Court of the United States, a few years since, in which that learned court gave a construction to the language of a particular conveyance of land. The calls in the deed before the court were to begin at a point described, thence south, with the foot of W.'s ridge, 894 poles to a stake at letter H. on H. and company's survey; thence west, crossing W.'s ridge, 894 poles to a stake; thence north 894 poles to a stake; then a direct line to the beginning. It was admitted that the first line was the only one in fact run, and that the corners therein described existed. The court held that the monuments must control the measurement of the first line, although it did not give the whole distance called for; that the second line must be run at right angles with the first, leveling the chain in going over the mountain ridge so as to give horizontal instead of surface measurement; that the third line should, measuring in the same way, be run parallel with the first for the distance specified, and from the end thereof the fourth line should be run to the point of beginning (*McEwen v. Bulkley*, 24 Howard's R., 242).

In the State of Maine, land was conveyed bounding "thence to the mill brook; thence by the bank of said brook to," etc. The tide in the brook ebbed and flowed, and the bank continued to rise more or less precipitously above the high-water mark. The Supreme Court of the State held that the title of the grantee extended only to the line of ordinary high-water mark (*Stone v. Augusta*, 46 Maine R., 127). And the same court held that, where the boundary lines as given in a deed will satisfy either of two conflicting hypotheses as to what was meant to be conveyed, and the lot is further described as the "McKay farm, so called," the finding of the jury as to the location of the "McKay farm" will render the description certain and determine what land passes (*Mudden v. Tucker*, 46 Maine R., 367).

In the State of New Hampshire, a deed of land upon a stream described it by the number of the lot, and added, "being the same farm on which the said K. now lives." An island in the stream, opposite to and nearest the farm, was not occupied by K. The Supreme Court of the State decided that the words were not restrictive, and held that the island passed by the deed to the grantee. And the court reiterated the doctrine, that a conveyance of land bounded on a river not navigable conveys the land to the middle line of the river, including any island situated on that side of such middle (*Kimball v. Schoff*, 40 N. H. R., 190). The same court had before it another interesting case, in which it appeared that a committee to make partition of land, known as the "Thomas Clough purchase," between heirs, set off to No. 7 as follows: Beginning at the south-east corner, and running north "to the south-east corner of the fourth division lot, No. 70; thence westerly, on the divisional line between said purchase and said lot, so far as to make seventy-six rods directly west from said corner, to a stake and stones;" thence south, etc.; and to No. 8 as follows: Beginning at the south-west corner of No. 7, thence north, etc., to said stake and stones, as "the north-west corner of share No. 7; thence westerly, on the line of said purchase, to the 100 acre lot No. 3;" thence southerly, etc., and made report accordingly. The court held that the phrase, "so far as to make seventy-six rods directly west from said corner," had reference rather to the width of lot 7, at the north end, than to the location of the stake and stones, and that said stake must be in said divisional line, whatever its direction from said corner of lot 70. The court also held that evidence to prove that the committee ran out and established a line as the north line of said Clough purchase, and fixed bounds there, which bounds and line were some distance south of the true courses and line between said purchase and said lot 70, and that said committee made their partition upon and according to that line and those bounds, and intended to bind the heirs by that line instead of the divisional line between said lots, was inadmissible, as tending directly to contradict the terms of the report (*Sanborn v. Clough*, 40 N. H. R., 316). And the same court disposed of another case, in which it appeared that the deed commenced its description "at a stake and stones at the south-west corner" of the premises intended to be conveyed, "it being the north-east corner of land that D. W. deeded to J. W., May 20th, 1815." The

court held that this language could only be construed as intending to describe and to convey land, the south-west corner of which was identical with the north-east corner of the tract referred to therein. And the court declared that, where a deed described the line of the premises intended to be conveyed as running "by the land the said D. deeded to the said J. W.," the word "by" was not to be construed as meaning "over," or "across," but "along the line of" the tract of land referred to therein (*Bailey v. White*, 41 N. H. R., 337).

The Supreme Judicial Court of Massachusetts disposed of a case in which it appeared that a grant of land, bounded southerly on a passageway lying between the land conveyed and a house owned by the grantor, described by measurements which excluded the passageway, and made by a conveyance which contained a provision that the grantee and his heirs and assigns should have the use of the passageway situated between the land conveyed and the house referred to; and that the grantor, his heirs, assigns and tenants of his other estates should also have equal use and improvement thereof, and in which reference was made to a plan upon which the lot was drawn as distinct from the passageway, and with courses and distances corresponding with those mentioned in the deed. The court held that the grant passed a title only to the side line of the passageway; and the court laid down the doctrine that, where land is conveyed bounding upon a way, the question whether the grant extends to the side or center line thereof depends in such case upon the intent of the parties, as expressed in the descriptive parts of the deed and explained and illustrated by all the other parts thereof, and by reference to the localities and subject-matter to which it applies (*Codman v. Evans*, 1 Allen's R., 443).

In the State of North Carolina, where a deed of land called for a stone, and, in the designated course, pointers, corresponding in age with the deed, were found around a spot (no stone being there), and a marked line of trees was also found, corresponding in age with the deed and corresponding with the next course called for, and leading from the spot so designated by the pointers, the Supreme Court of the State held that the deed should be construed as if it read, "a stone marked as a corner by pointers;" and that such point was to be gone to, irrespective of distance. And the court declared that where the first line, running from an admitted beginning corner,

is established, and there is a line of marked trees, corresponding in age with the deed and with the course called for, running to the third corner, which is established, as in the case before the court, the second corner may be fixed by running the second line; and the point of intersection of the latter line with the former will be adopted, irrespective of course and distance (*Safret v. Hartman*, 7 *Jones' Law R.*, 199). And the same court decided that a call, from the mouth of a swamp down a swash to the mouth of another swamp, should be held to mean a straight line from one point to the other through the swash (*Burnett v. Thompson*, 7 *Jones' Law R.*, 407). And the same court also held that, in ascertaining the boundaries of a tract of land, one kind of natural objects, called for in a deed, is not, as a matter of law, entitled to more respect or of more importance than another (*Patton v. Alexander*, 7 *Jones' Law R.*, 603).

In a case before the Circuit Court of the United States for the district of Massachusetts, at an early day, it appeared that A. conveyed to B., by deed, a certain piece of land by specific boundaries, and then added: "It being the same land given by my mother to him, the said B., by her last will and testament; said land containing about five acres." The devise in the will was of "a piece of land of about four or five acres, lying a little north-westwardly from the aforesaid lots, and reaching back to a ditch." The court held that the latter clause did not control the specific boundaries in the deed, even supposing the will would admit of narrower limits, or was of doubtful construction (*Howell v. Saule*, 5 *Mason's R.*, 410).

An early case came before the courts of Kentucky, wherein it appeared that three of the corners of a survey of four lines were found; at the fourth there never was a corner marked, and the patent called for no corner, but barely, in approaching the corner, called for 260 poles on the line of another survey. To run the two lines from the corners found to their intersection by course, and there to fix the corner, the line of 260 poles, named in the patent, would be extended far longer than that number of poles. The Court of Appeals of the State held that the line must be terminated at that distance; and that the course of the next line must yield to the distance called for on the line of the adjoining survey; and that from the termination of that distance a line

must run direct such a course as would strike the next lower corner (*Calvert v. Fitzgerald*, 6 *Littell's R.*, 391).

In the State of North Carolina, where a call in a grant was "running north 45 degrees, west 220 poles, to a black-oak near his (the grantee's) own line," and it appeared that the black-oak could not be found, nor the place where it stood identified, the Supreme Court of the State held that the word *near* would not carry the line thirty poles farther to reach another tract of the grantee's; but that it must be stopped at the end of the distance mentioned in the grant (*Harvy v. Graham*, 1 *Dev. & Batt. R.*, 76).

In the State of Maryland, where a grant of a tract of land described it as lying on the east side of Chesapeake bay, and on the south side of a river in said bay called St. Michael's river, next adjoining the land of H. M., beginning at the said H. M.'s northernmost bounded oak, running north-east and by north up the river, and for breadth 175 perches, to a marked pine by a marsh, bounding on the east by a line drawn south, and by east from the said pine for length 320 perches; on the south by a line drawn south-west, and by south for breadth from the end of the south and by east line until it intersect a parallel drawn from the land of H. M.; on the west with said land and parallel, on the north, with said river, containing, etc., the Court of Appeals decided that the tract must be located from its beginning to the place where the second bounder stood; and from such place, according to the course and distance expressed in the grant, running 320 perches to the end of the second line, according to such course and distance; and from thence, according to the course and distance expressed in the grant for the third line, to the place where the third line should intersect with a parallel drawn from H. M.'s land; and from thence, according to the grant, to the beginning (the jury having found from the evidence where the second bounder stood, and where the third line intersected with the parallel), although such location ran the track across the land of H. M. (*Gibson v. Smith*, 1 *Har. & Johns. R.*, 253). And another case was disposed of by the same distinguished court, wherein it appeared that a grant of land contained the following descriptions: beginning at a bounded white-oak, standing about twenty perches on the east side of Antietum, running north, etc. (twelve courses); then south eighty-four degrees west, 343 perches,

to the end of seventy-three perches on the fourth line of Good Luck; then with said land reversed south twenty-eight degrees, west seventy-three perches; south eighty-two degrees, west forty-six perches; north fifty-eight degrees, west seventy-five perches; thence south seventy-three degrees, west twenty perches. The court held that the true location of this grant was to run the course south, twenty-eight degrees west, seventy-three perches, reversed with *Good Luck*; then course and distance according to the expressions in the grant (*Kirkpatrick v. Kyger*, 1 Har. & Johns. R., 298).

An interesting case was decided by the Supreme Court of Ohio, at an early day, involving an important principle in the construction of certain conveyances of real estate. The deed described the land intended to be conveyed as "seventy acres, being and lying in the south-west corner" of a section. The court held the description to be a good one, and that the land conveyed should be laid off in a square (*Walsh v. Ringer*, 2 Hammond's R., 327).

But in a case decided by the Court of Appeals of the commonwealth of Kentucky, it appeared that the calls in the deed were to run from a corner on a river, "down the river these several courses" (giving the courses, but no corners), "to the beginning; but, when reduced to a straight line, is three thousand and fifty poles." The beginning was also on the river. The court held that the intention was to make the river the boundary between the parties (*Cockrell v. McQuinn*, 4 Monroe's R., 243).

In the act incorporating the town of Hamilton, in the State of Massachusetts, the boundary line was described as "running by a river to a wall, etc.; then by said wall, etc." It appeared that the wall was nearly at right angles with the river; and from the end of it was a wooden fence about two rods, and beyond that the bank was so steep that a fence was unnecessary. The Supreme Judicial Court held that the boundary line did not cross the river diagonally to the end of the wall, but followed the thread of the river (not navigable) until it reached the point where the wall, if continued, would intersect the thread of the river; and, thence making an angle, it took the line of the wall (*Ex parte Ipswich*, 13 Pick. R., 431).

An early case was disposed of by the Supreme Court of New Hampshire, in which it appeared that a person, being seised of

land lying partly in lot No. 10 and partly in lot No. 9, granted a tract of land which he described in the deed as lot No. 10, but was bounded on all sides by lands of other persons. The court held that the whole of the land of the grantor, lying in both lots, passed by the conveyance, although in the descriptions of the premises there were mistakes as to the owners of adjoining lots (*Tenny v. Beard*, 5 N. H. R., 58).

An early case before the Supreme Court of Connecticut, involving important principles of construction of conveyances of land, was this: The owner of two adjoining lots, the northern one called Gross lot, and the southern called Belden lot, conveyed the former. The deed contained a threefold description of the premises, viz., as bounded south on the Belden lot, as being the estate which the grantor then possessed, and as being the estate which the grantor purchased of one Gross. Previous to this conveyance, and while the grantor owned both lots, and occupied the Gross lot, he erected a fence on the front line of the lot, and placed a post at the south end of such fence. There was no evidence that this post was intended as a bound, and no evidence as to the extent of the grantor's possession, except such fence and post; and there seemed no object in keeping the lines of the lots distinct. The court held that the post referred to could not control the line of the Gross lot; but that, if it could be ascertained, it must govern, as that description would accord with the others, and thus each might be satisfied; but if the line of the Gross lot could not be ascertained, then resort might be had to the actual possession of the grantor when he executed the deed. And the court laid down the rule, as applicable to the case, that, where there are several descriptions of the premises in a deed, such construction will be given to it as will, if possible, satisfy each (*Law v. Hempstead*, 10 Conn. R., 23).

An early case was decided by the old Supreme Court of the State of New York, involving the interpretation of certain language in the description of the land in a deed, which was different from most cases of the kind before the courts. The deed conveyed "150 acres of land, being and lying in township No. 1, west of Genesee river (south-east corner of said town, beginning two miles north of Canawagus, and bounding on the said river), to be in common and undivided." The court held that the words "beginning" and "bounding" referred to the 150 acres, and not

to the town or corner of the town (*Jackson v. Van Antwerp*, 8 Cow. R., 273).

A case was several years ago decided by the Circuit Court of the United States for the district of Massachusetts, wherein it appeared that in a grant of land from the commonwealth of Massachusetts to the towns of Taunton and Raynhaven, the land was described as "beginning on the north line of the million acres, at a yellow birch tree, six miles east from the south-east corner," etc. (the said birch tree being marked as a monument in the original survey of the land), whereas the said birch tree did not, in fact, stand upon the said north line, as happened, but was so situated that a gore of land was left between it and the said north line. The court held that the said birch tree, and not the said north line, was to be taken as the boundary of the land granted (*Cleveland v. Smith*, 2 Story's R., 278).

CHAPTER XVI.

FURTHER CASES PASSED UPON BY THE COURTS, GIVING CONSTRUCTION TO PARTICULAR CONVEYANCES IN RESPECT TO BOUNDARY — CASES IN THE AMERICAN COURTS MISCELLANEOUSLY STATED.

THE cases which have been considered by the courts, involving the construction of conveyances in respect to boundary, are more numerous than was at first supposed, and it seems important to devote still further space to the examination of such cases. An interesting case which came before the Supreme Judicial Court of Massachusetts, of the character indicated, was this: A straight turnpike road, which twice crossed a circuitous county road, was laid out four rods wide, through the land of one B., leaving a strip of his land between the turnpike and the county road. B. afterward conveyed this strip to one Parker, and house and lots on the other side of the turnpike to C. and others, bounding each of them, on one side, "by the turnpike road." Parker erected a building on the strip thus conveyed to him, and, after he had occupied it over thirty years, the turnpike road was discontinued. Thereupon a town way was laid out, two rods wide, over a part of the land formerly within the limits of the turnpike road, and

within seven feet of the line thereof next to Parker's strip, and Parker made a claim on the town for damages alleged to be thereby sustained by him. The court held that B.'s deed to Parker did not convey any part of the land within the limits of the turnpike road, and that Parker was not entitled to damages (*Parker v. Inhabitants of Framingham*, 8 Met. R., 260). And the same distinguished court disposed of another important case, involving the construction of deeds of land, at a term or two earlier, wherein it appeared that A. and B., tenants in common of land, made partition by deed. A. quitclaimed to B., by metes and bounds, "forty-seven and a half acres and twenty rods, excepting one-half of the road; also, all of the upper part of the house and half of the cellar, except the east great room; also, all the north part of the great barn to the middle of the floor," etc. B. quitclaimed to A., by metes and bounds, the same number of acres and rods, "except half the road; also, one-half of the house, containing all of the lower part, except one-half of the cellar; also, the said A. is to have the east great room, and the east part of the great barn, to the middle of the barn floor, the line to run east and west through the barn floor." The court held that by these deeds the buildings were divided so as to be held in severalty, and that the land under the north part of the barn passed to B. (*Inhabitants of Cheshire v. Inhabitants of Shutesbury*, 7 Met. R., 566). And in a later case, before the same court, it appeared that a grantor made a deed of bargain and sale of land, describing it by metes and bounds, and as bounded on one side by a street, and also as being "the same that was set off to W." The land set off to W. did not extend to the street, and the grantor was not seised of any land besides that which had been so set off. The court held that the land which the deed purported to convey was truly described by the metes and bounds referred to, and that this description was not controlled by the subsequent reference to the land set off to W. (*Dana v. Middlesex Bank*, 10 Met. R., 250).

The following case was disposed of by the Supreme Court of Maine: A. granted to B. "a certain lot of land situated on my home farm in W., on the west side of the road," containing twenty acres, "the said lot to contain one acre, in such shape as the said [B.] may choose," and "said one acre is supposed to contain a ledge of limestone or marble." At the time of the conveyance, there was upon the twenty acres a ledge of limestone or marble,

and at a distance therefrom a dwelling-house, barn and other buildings. The court held that B. had no right to so locate his acre as to include the ledge of limestone and marble, and from thence to run a narrow strip of land to the buildings, and include within his one-acre lot the land on which the buildings stood (*Grove v. Drummond*, 25 *Maine R.*, 185).

A case came before the Supreme Court of North Carolina involving the interpretation of a deed of land, in which it appeared that a grant called for a line from a certain point, "thence N. 87 W. 179 poles, to a hickory, thence the courses of the swamp to the beginning." The distance, by measurement, fell short of the swamp nine chains and fifty links, and no hickory in the course could be found, and there was no proof of its having been there. The court held that the line should be extended on the course to the swamp (*McPhaul v. Gilchrist*, 7 *Iredell's R.*, 169). And the same court held, at about the same date, that a deed of "the storehouse wherein A. has a store, now occupied by him as a post-office, with the outhouse and office adjoining, passed the lot of land on which the buildings stood, there being nothing in the deed to give it a contrary effect" (*Wise v. Wheeler*, 6 *Iredell's R.*, 196).

The Court of Errors of the State of South Carolina gave a construction to a sheriff's deed of land, some years ago, wherein the conveyance described the premises as follows: "All that plantation or tract of land, situate, lying and being in the district of C., containing seventy acres by computation, be the same more or less, butting and bounding to the north on S. river, westwardly on land of W. R. D., J. S., and on the line dividing O. and C. districts, south on land of J. S., and comprehending all the lands on C. district belonging to the estate of J. N., and known as the southern part of N.'s ferry." The court held that the deed conveyed all the land within the boundaries, although it amounted to about 973 acres (*Gourdin v. Javis*, 2 *Richardson's R.*, 481). And another case came before the same high court, at about the same time, in which it appeared that land was described in a sheriff's deed as "1,000 acres, more or less, adjoining lands of F. W. Pickens, Proctor and others." The defendant owned two adjoining parcels of land, one called the "Anderson land," containing 1,007 acres, the other the "Owens land," containing 218 acres. The boundary, in the deed, applied equally, whether the Owens land was included or

excluded. The jury in the court below found that the deed passed only the Anderson land, and the court above held the verdict correct. And the rule was laid down, that if the land can be otherwise located, the quantity mentioned in the conveyance is, in general, immaterial; but when it is resorted to as one of the evidences of intention, it becomes a material part of the description (*Dyson v. Leek*, 2 *Rich. R.*, 543).

A case was, some years since, decided by the Supreme Court of Appeals of the State of Virginia, in which it appeared that A., owning a tract of land supposed to contain 290 acres, sold 150 acres to B., from the south end of the tract, the parties believing a certain line, A B, to be the north boundary of the lot sold. Afterward A. conveyed to C. the north part of the same tract, "all the residue thereof lying on the north side of the part sold B," both parties supposing the line A B to be the north boundary of the lot sold to B. It afterward appeared that, between the line A B and the north line of the lot sold to B., there was a tract of about 130 acres. The court held that this tract of thirteen acres did not pass by the deed to C. (*Seamond v. McGinnis*, 3 *Grattan's R.*, 319).

The Supreme Court of Connecticut, some years since, decided a case in which the deed under which plaintiff claimed title described the premises as "half an acre, occupied as a canal, and bounded north-easterly by a line parallel with the north-easterly line of said canal, two feet therefrom." The court held that the word "canal," as used in this deed, imported the whole excavation made for the purpose of the canal, and that the line of the canal was, therefore, the top of the canal bank, and not the edge of the water in the canal (*Bishop v. Seeley*, 18 *Conn. R.*, 389).

The Supreme Court of Pennsylvania made an important decision in a case, wherein it appeared that a testator's farm consisted of 412 acres, to which he had a perfect title, and a small adjoining lot of twenty-five acres, of which the warrant and survey had not been returned. Both tracts had been improved by him as one farm. His executor, by written articles, agreed for the sale of the farm, describing it as "all that tract known as Annan's (testator's) farm." The court held that this description covered both tracts, and that a subsequent title, obtained by the executor from the commonwealth, to the small lot, inured to the benefit of his vendee (*Wood v. Jones*, 7 *Barr's R.*, 478).

In a deed executed by A. and B. to a third party in the State of Maine, the description of the premises was as follows: "A lot of land, situated in C., conveyed to us by D., by deed dated May 25th, 1836, and recorded in book 92, page 51." The deed recorded on the book and page named was from D. to B., and bearing the date of May 25th, 1835, and there was no other deed on record from D. to B., or to A., and B., and no deed recorded between any of those parties dated May 25th, 1836. The Supreme Court of the State held that the land described in the deed recorded on "book 92, page 51," passed by the deed of A. and B. to the grantee (*Vose v. Bradstreet*, 27 *Maine R.*, 156).

The Supreme Court of Alabama held, in a case several years ago, that a deed conveying "the south part of the east half of the north-east quarter of section 27, township 16, and range 12, containing 40.10 acres," was not a conveyance of the south half of the half quarter section without reference to quantity, but of the number of acres mentioned of the south half of that quarter section. And it was declared that the fact that the patent for the same tract called for 80.20 acres could not control such construction, and that parol evidence was not admissible to show that the entire south half of the half quarter section was intended to be conveyed (*Lamar v. Minter*, 13 *Ala. R.*, 30).

A very important and well-considered case was decided by the Superior Court of the city of New York in the year 1848, which has been often quoted and approved since by the Supreme Court and Court of Appeals of the State, and which settles the doctrine with much clearness in respect to boundary upon streets and public highways. The case was this: The owners of adjoining farms agreed to straighten the line between them, commencing at a point on a street which was common to both, and to lay out a road on each side of such line; and, soon after this was effected, in the division of one of the farms among its joint owners, an allotment of the same was conveyed to one of such owners, described as beginning on the street first mentioned, "at" the road so laid out, and running "along the said road," etc., by courses and distances. The court held that the grantee took the land to the center of the road, in front of the parcel so conveyed, notwithstanding that on a map of the farm so subdivided, to which reference was made in the same conveyance, the lot so conveyed was laid down as bounded by the external line of said road. Oakley,

J., who delivered the opinion of the court, among other things said: "In the location of deeds or grants of land, the first object is to ascertain the place of beginning. When this is done it is a controlling circumstance to determine the true location; and it will be particularly so in the present case, as the first line from the place of beginning runs with a given course to a certain monument, passing the premises in question, and, consequently, cannot be varied by any subsequent courses or monuments in the deed. * * * Assuming that the position taken by the plaintiff's counsel is sound, and that the words 'beginning at the road' are equivalent to '*beginning at the side of the road*,' it still seems to us that, by the well-established rules of law, these deeds must be held to include the land to the center of the road. The doctrine on the subject is that the owner of land on each side of a road or stream of water not navigable is, *prima facie*, presumed to own to the center, subject to the public right of way; and, in the construction of deeds, the general rule is that where a deed or grant of land is *bounded on a highway, or runs along a highway*, or when the boundary line runs to a highway, it conveys the land to the center of the road, if there be no words or specific description to show the contrary; and such words or specific description must be of a very decided and controlling character. * * * As to the map, we do not consider that it can affect the construction of the deed so as to take it out of the general rules of law before stated. We apprehend that it is not usual, when a map is made of a farm or lot of land bounded by a road, to include any part of the road within the lines, any more than to include it in a deed by express terms. The principal object of a map is to show the extent of the beneficial ownership of the proprietor, and his right of exclusive occupancy; and this is particularly the case with a map of the partition of land, where the lots are marked out and measured with a view to their actual contents and their relative value. The deed and map in question, taken together, in fact constitute one description of the land conveyed; and they simply show a lot bounded generally on a road or highway. In locating a map, we suppose that the same rule of law will apply as in the case of a deed. Where a map has a road forming one of the sides, in judgment of law it includes that half of the road, although the line actually marked on the map would seem to exclude it. We must conclude, therefore, that the plaintiff has failed in the

attempt to except the deed out of the general rules previously laid down" (*Herring v. Fisher*, 1 *Sandf. R.*, 344, 347-349).

A case before the Supreme Court of Maine, involving important principles in point, was this: A deed of a tract of land was executed and delivered, in which the premises were bounded "partly on a stream, as the said lot was surveyed by L. L., Esq., reference being had to the plan;" and the plan showed a straight line drawn along the stream, pursuing its general course, but crossing the stream at a curvature and taking in a piece of land on the other side within the curvature, and the lines named in the deed did not entirely surround the tract; but by substituting the straight lines, instead of the stream, the tract was surrounded. The court held that the straight line must be regarded as the true boundary, and that the land on the other side of the stream, between the curvature and the straight line, was embraced in the deed (*Eaton v. Knapp*, 29 *Maine R.*, 120). And in another case before the same court, where a deed conveyed a lot of land "containing a certain number of acres, more or less," bounded partly by lot number 53, partly by A.'s lot, and partly by the shore of a river; said premises being the lot numbered 52 in the plan of the town where the land was situate, it was held that the plan was the more certain monument, and must control the other, the two being inconsistent (*Lincoln v. Wilder*, 29 *Maine R.*, 169).

In a case decided by the Supreme Court of North Carolina, it appeared that the grant to be considered began on a lake, and thence ran south a certain distance, then again west a certain distance, then north a certain distance, thence east a certain distance, "with the windings of the lake-water to the beginning." The court held that, although the distance mentioned in the third line should fail before the lake was reached, yet it must be continued in a direct course toward the lake until it should strike the lake. And the court declared that a flat, annexed to a grant, cannot control the calls of the grant, where it does not lay down a natural boundary therein called for (*Literary Fund v. Clark*, 9 *Ired. R.*, 58).

In the State of Maine a case came before the Supreme Court, wherein it appeared that a farm, bounding at one end on a river, was a little wider at that end than at the other. One-half of the farm was conveyed by deed, separated from the other half by a line beginning at the river and running back, "holding its width

equally alike" the whole length of the farm. The court held that the grantee was entitled to a strip of equal width throughout, and of such width as to give him a number of acres equal to the number retained by the grantor (*Patterson v. Trask*, 30 *Maine R.*, 28). And the same court had another case before it, at about the same time, in which it appeared that lines were run by the grantees under two deeds of adjoining tracts of land, made at the same time, on which lines, with the intention of conforming to the location, they soon after established monuments, and continued to occupy accordingly for more than twenty years. The court held that the distances named in the deeds must yield to such location. And it was further held in the case that evidence was admissible to show that the location was made in conformity with an established custom and usage, existing at the time of giving a particular measure, in locating the territory in question (*Mosher v. Berry*, 30 *Maine R.*, 83).

In a case before the Supreme Court of Vermont it appeared that land was conveyed by deed by this description: "Beginning at the intersection of the road from Chelsea to Allen's saw-mill, and the branch on which the saw-mill stands, on the northerly side of said branch, and nearly opposite my new dwelling-house; thence on the easterly side of said road until the said road strikes the bank of said branch; thence down said branch in the middle of the channel to the first mentioned bounds." The court held that the point of commencement was at the intersection of the northerly bank of the stream with the eastern side or edge of the road; and that no land lying south of that point, and no part of the highway, was intended to be conveyed by the deed. That is to say, such was the decision of the court, although Redfield, J., differed with his brethren in the construction put upon the language of the deed, and, therefore, dissented from the judgment entered in the case (*Buck v. Squires*, 22 *Vt. R.*, 484).

The Supreme Court of Illinois decided a case several years ago of some importance, in which it appeared that a mortgage had been executed upon a parcel of land; and the premises were described in the mortgage as the south-east quarter of a section, as numbered and designated in the survey of the United States, containing "sixty-one acres of land." The court held that the designation was sufficiently certain, although there were more than sixty-one acres; and it was decided that the mortgage covered

the entire quarter section, as laid out on the government survey (*Kruse v. Scripps*, 11 *Ill. R.*, 98).

A case of importance, involving the question of construing a deed of land in reference to a record paper, was decided some years since by the Supreme Judicial Court of Massachusetts, which may properly be noted. The owner conveyed "one undivided half of all the buildings that are situated on the homestead I now improve and occupy, with the land under and about the same;" and, on the same day, made a lease in writing, not sealed, to the grantor of "one-half of all the buildings and land under and adjoining the same, situated in R.; it being the homestead of the said grantor." The court held that the lease might be considered in construing the deed; and that the said one undivided half of the said entire parcel upon which the buildings stood, with the land immediately adjacent, altogether constituting the homestead of the grantor, passed to the grantee. And it was declared as a rule that, where two deeds or instruments are executed at the same time, between the same parties and respecting the same subject, the terms of one of them may be considered in construing the other, if the terms of the latter are ambiguous (*Clayes v. Sweetser*, 4 *Cush. R.*, 403).

A very interesting case was decided by the present Supreme Court of the State of New York, at an early day of its organization, involving the construction to be put upon a sheriff's deed of land, in which the premises were described as follows: "All that certain piece or tract of land situate, lying and being in the town of Brutus and county of Cayuga, on lot number fifty-five, bounded on the west by the highway as leading from Anna Passage's to the Erie canal, east by land occupied by Joshua Bishop, and south by land owned by G. F. Wilson, containing about two acres of land, be the same more or less." It appeared that the premises in dispute were once owned by P. F. Wilson, but were not bounded on the south by any lands that were or ever had been owned by him. But directly north of and adjoining the premises in dispute was another parcel of land answering the description in the sheriff's deed in every respect, and in which the judgment debtor had, at the time, an interest in right of his wife, liable to be sold on execution. The court held that the deed did not embrace the premises in dispute; but that it did include the parcel lying on the north. And the doctrine was

laid down that, where a deed, in describing premises conveyed, bounds them on one side by lands mentioned as owned by another person (speaking in the present tense), when in fact, at the date of the deed, there is no land owned by such person in that place, the land recently owned by him will be intended, and the deed shall receive this construction *ut res magis valeat quam pereat*. And further, that if, in a deed, there are certain particulars, once sufficiently ascertained, which designate the thing intended to be granted, the addition of a circumstance false, or mistaken, will not frustrate the grant. And that, if there is a certain description of the premises conveyed, and a further description is added, it is immaterial whether the superadded description be true or false (*Mason v. White*, 11 Barb. R., 173). This case has been criticised in subsequent cases, but the correctness of the decision, or of the doctrine here stated, does not seem to have been questioned in any adjudicated case.

A case, some years since, was decided by the Supreme Court of Illinois, involving the construction of the description contained in a tax deed. The deed purported to convey part of a town lot, "viz., twenty feet on Main street, commencing forty feet from alley, undivided half lot No. 6, in block No. 7, in the town of Peoria." The court held that the deed must be construed as embracing a parcel of land twenty feet wide, extending back from Main street, the whole depth of the lot, whatever it might be. And the court declared the doctrine that the construction of a tax deed, in respect to the description of the land conveyed, must be the same as if such description were used in a deed between private individuals. And further, it was held in the case, that the doctrine of strict construction, as applied to the execution of naked statutory powers, has no application in such a case (*Blakeley v. Bestor*, 13 Ill. R., 708).

In a case before the Supreme Court of Maine, it appeared that the north line of A.'s land was 100 rods and six inches north from the public road. A levy was made of land, described as beginning at a tree eighty-five and a half rods north from the road, and lying north of A.'s land and extending from said tree north seventy-two and a half rods; thence east fourteen rods; thence south seventy-two and a half rods to the north-east corner of A.'s land; thence west, along his north line, to said tree. The tree could not be found. The court very properly held that the south

line of the levy was at A.'s north line (*Alden v. Noonan*, 32 *Maine R.*, 113).

The Supreme Judicial Court of Massachusetts held, some years ago, that where a parcel of land was conveyed "beginning at" and "bounding on land of B.," the point of beginning and boundary was the true line of B.'s land, and not the line of B.'s occupation as shown by a fence set up and maintained by B. before and after the conveyance, with the consent of the owner of the lot conveyed, under the mistaken belief that such was the true line (*Cleveland v. Flagg*, 4 *Cush. R.*, 76). And the same court held, at a later term, in a case wherein it appeared that the boundary line of land conveyed was described in the deed as running parallel with, and within seven inches of, a certain wall, but its length was not given, that the line should be run as far as the grantor had a right to extend it, in order to give the full and proper effect to the grant (*Dall v. Brown*, 5 *Cush. R.*, 289).

The Court of Appeals of the State of Maryland decided a case, some twenty years ago, in which several points relating to boundary were settled. The question arose under a conveyance of a tract of land wherein the call was to begin at a bounded tree by the side of a branch, and to run the course and distance to a known boundary. It appeared that the beginning tree was lost. The court held that the commencement of the first line of the tract must be found by running the course and distance from the known boundary, and the line to the branch not elongated or shortened, the expression as to the branch being declared to be merely descriptive of the general locality of the tree, and not an imperative call, locating the spot where the tree stood. And it was said to be no objection to this rule that by the reversal of the line the beginning was shown to be in deep, navigable water, at a distance from the shore, or where the lost beginning could not have stood. It was said that the leading object in the gratification of calls is certainly in the location of the grant, and it was declared to be a general rule that, if there be a peremptory call to an object of length by a course and distance line, and the object can be reached by gratifying the distance, but violating the course, or by conforming to the course and disregarding the distance, the course must control the distance. The following other points were made by the court in the case: The word "by," when descriptively used in a grant, as it was in the case at bar, does not mean "in

immediate contact with," but "near" to the object to which it relates; and near is a relative term, meaning, when used in land patents, very unequal and different distances. The reason assigned for running lines of lands to the boundaries called for at their terminations, instead of terminating them according to their courses and distances, is not exclusively that greater certainty as to the termini of such lines is thereby attained, but also because thus locating grants is more beneficial to grantees; and because it is a rule of construction, in expounding grants, to give them that interpretation which operates most strongly against grantors and in favor of the grantees. A deed or patent for a tract of land passes nothing, unless the land described therein is susceptible of location, or, in other words, unless the survey thereof can be made to close, either as to the whole tract conveyed or some definite part thereof. If a tract of land be granted by boundaries only, without courses and distances, if the beginning or any subsequent boundary be lost, and its original situs cannot be proved, the entire tract is lost, and the grant thereby becomes inoperative. If a tract be granted by courses and distances only, without calling for any boundary or object, save that at the commencement of the first line, and that be lost, and no proof can be adduced of the beginning or ending of any of its lines, the tract becomes a nonentity; in other words, the grant is a nullity. If a grant be made, not only with courses and distances, but with calls, it has a principle of self-sustentation, not possessed by grants with course and distance only, or with calls only. Where a grant is by course and distance and calls, if the beginning, and any or all of the boundaries, save one, are lost and incapable of proof, the vitality of the grant still continues. This is the natural import of the express words of the grant. A valid survey or grant may be made without stating any natural object as being the beginning of its first line, if there be a boundary at the termination thereof. It is no objection to the validity of a grant that the place of its beginning is covered with water, whether navigable or otherwise; or that any of its lines run across such water. And in cases of grants of land, describing it by courses and distances and calls, the courts of Maryland have determined that, in locating them, they shall first be run by the calls; but if that be impracticable, they shall then be located by course and distance (*Wilson v. Inloes*, 6 *Gill's R.*, 121).

The Supreme Court of Pennsylvania has decided that, where land was described in a conveyance as bounded by adjoining lots and by a street, and the quantity of ground within these bounds exceeded by twelve feet the measurement contained in the conveyance, the boundaries governed (*Pitts v. Gaw*, 15 *Penn. R.*, 218). And in another case before the same court, it appeared that a survey returned calls for others on three sides, and on the fourth for A., "or vacant," and there was no evidence given that the line on that side was run. The court held that it was not erroneous for the court to charge the jury that the return was equivocal, or indicated nothing more than that the land on that side was left open or undecided upon by the surveyor. The court also declared that the marks on the ground of an old survey, indicating the lines originally run, are the best evidence of the location of the survey, and that if any evidence of such lines exist, it should be referred to the jury (*Gratz v. Hoover*, 16 *Penn. R.*, 232).

The Supreme Court of North Carolina decided, some years ago, that where a grant calls for the line of an old survey, the rule is that it must go to it, unless a natural object or marked tree is called for, and, before the calls of the junior grant can be ascertained, those of the old must be located (*Dula v. McGhee*, 12 *Ired. R.*, 332).

CHAPTER XVII.

STILL FURTHER CASES PASSED UPON BY THE COURTS, GIVING CONSTRUCTION TO PARTICULAR CONVEYANCES IN RESPECT TO BOUNDARY — CASES MISCELLANEOUSLY STATED.

THE examination of leading cases passed upon by the courts, involving the construction of particular conveyances relating to boundary, may be still further continued. The Supreme Judicial Court of Massachusetts, some years since, decided a case, in which it appeared that A. conveyed land to B., describing it as bounded "north on the line of Blandford." The line of the town of Blandford was subsequently established by an act of the legislature; after which B. conveyed to C. by a similar description. The court held that the line so established was the northern boundary of the land included in the deed from B. to C.; and that parol evidence

was inadmissible to show that, prior to this act of the legislature, the line of Blandford was understood and reputed to be farther north than the line so established, and was defined by a line of marked trees; and that the deed from B. to C. was intended and understood by the parties to convey the same land included in the deed from A. to B. (*Cook v. Babcock*, 7 *Cush. R.*, 526).

A case decided by the Supreme Court of Maine, involving the construction of the descriptive language of a deed of land, was this: The deed described the land conveyed as "lot No. three;" "being the same farm that A. now lives on." In point of fact, the farm which A. then lived on was not lot No. three, but lot No. one. The court held that the farm, on which A. then lived, passed by the deed. It may be of interest further to state that a warranty deed of land from A. to B. came also before the court for adjudication in the case, which contained, at the close of the covenant, the following clause: "Provided, that the said A. shall pay or cause to be paid to C. a note of hand" (describing it), "signed by A. and B." The court decided that no effect could be given to this clause in the deed, it being incomplete, unmeaning and inoperative (*Abbott v. Pike*, 33 *Maine R.*, 204).

The Supreme Court of Michigan decided a case, some twenty years ago, in which it appeared that a deed described a piece of land as all that tract or parcel of land situate in the town of Logan, county of Lenawee, and Territory of Michigan; being known and distinguished as the east half of the north-west quarter of section twenty-one, in township number twenty-six, south of range number three. There was no surveyed township number twenty-six in Logan. The court held that the number of the township might be rejected, as repugnant to the other parts of the description; and it appearing, from the act organizing the town, that there were two sections numbered twenty-one in the town, corresponding with the description in the deed, one in surveyed township numbered six, and one in surveyed township numbered seven, both in range three, east, the same was held to be a patent ambiguity, although the court was bound judicially to take notice of the act organizing the town, and that parol evidence of surrounding circumstances and collateral facts might be received to show which of the two sections was intended by the grantor (*Ives v. Kimball*, 1 *Mich. R.*, 308). And another important case was decided by the same court, at about the same time, involving

a question of boundary, as well as other interesting questions relating to the construction of a conveyance of real estate. The deed described the premises conveyed as a certain piece or parcel of land, situate in out-lot No. 10, in the village of P., to comprise lots Nos. 1 and 9, in the west part of the subdivision of the aforesaid lot No. 10, the same being 112 feet wide on the Mt. C. road, to the center of the road leading to the woolen factory, and extending in length to the center of the Clinton river, with the privilege of fifty square inches of water, to be applied five feet from the surface of the Clinton river, opposite the place of taking water from the race; to be subject, at all times and forever, to the woolen factory, and one run of stones for flouring, after such mills shall be erected; the dam and race to be forever put in repair by said party of the first part; the said two lots being a strip of land off from the south-westerly side of said out-lot No. 10, and being designated on a plat of the subdivision of said out-lot, this day recorded. The court held, 1. That the plat of the subdivision of lot No. 10 might be referred to for the purpose of giving a construction to the grant. 2. It appearing from the plat that lots 1 and 9 were separated by a strip of land marked "race and alley," and that lot No. 1 lay northerly of it, and between it and the Mt. C. road, and lot No. 9 lay southerly of it, and between it and the Clinton river, it was held that the fee in the strip of land did not pass by the deed. And it may be, also, of interest to state that it was further held in the case that the grantee could not draw the water through an orifice of fifty square inches into a flume or reservoir upon his own premises, and then apply it by a larger discharge than fifty square inches; thereby enabling him, a portion of every twenty-four hours, to drive machinery requiring more than fifty square inches of water to propel it (*Paddock v. Pardee*, 1 Mich. R., 421).

In a case before the Supreme Judicial Court of Massachusetts it appeared that a deed was executed and delivered for a parcel of land, in which the northerly boundary of the premises conveyed was described as "four feet north from the northerly side of the building now standing on said premises." The court held that this included the land on the northerly side of the building to the distance of four feet from the edge of the eaves (*Millett v. Fowle*, 8 Cush. R., 150). And in another case before the same court, at about the same time, in which a conveyance of land was involved,

the deed described the boundary line of the land conveyed as running northerly a certain distance to a highway; and from thence upon the highway, etc. The court held that the deed passed the land to the center of the highway, although the distance specified, by actual measurement, carried the line only to the southerly side of the highway (*Newhall v. Ireson*, 8 *Cush. R.*, 595).

The Supreme Court of Missouri decided a case, several years since, upon the following facts: "Cedar Cabin" was the name by which a tract of land was known to the parties. On this tract stood a cedar cabin of trifling value. A. "resigned all his right, title and interest to the 'cedar cabin'" (without any further description) to B. for the sum of \$400. The court held that A., by this instrument, resigned all his claim to the "Cedar Cabin" tract of land (*Cravens v. Pettit*, 16 *Mo. R.*, 210). And the same court decided another case, at about the same time, where the deed described the land conveyed as "part of lot number three, which is more particularly known as the lot or part of lot on which the Hannibal hotel stood." The court held that all the land passed, by the deed, on which the hotel stood, although it covered part of lot three and part of an adjoining lot (*Bates v. Bower*, 17 *Mo. R.*, 550).

In a case, some years since, before the Supreme Court of New Hampshire it appeared that A. and B. owned a certain tract of land in common, of which A. owned one-third and B. two-thirds. Parties, duly authorized, set off B.'s share to him in severalty. At the time of the division, part of the land thus owned in common was covered by a pond of water, and the land set off to B. was bounded by the water's edge of said pond, at high-water mark, and included two-thirds of the common lot, exclusive of the land covered by the water; and B. assented to the location of his share, and the line of the water's edge as the boundary, and went into the possession of his share according to the location and line so agreed upon, and acquiesced therein for the space of about twenty-four years. The court held that the agreement, thus executed and acquiesced in, was conclusive evidence that B.'s share was correctly located, and that the boundary mentioned was an accurate division of the line, and that B. and his grantees were equally bound and concluded thereby (*Barry v. Garland*, 6 *Foster's R.*, 473).

The Supreme Court of Appeals of the State of Virginia, a few

years ago, decided a case involving principles relating to the boundary of lands, in which it appeared that owners of a large tract of land conveyed a part of it, and the call of the deed was: beginning on the line of a survey made for A., about six hundred and ninety poles from its northerly corner; running thence with A.'s line a given course and distance to two white-oaks, without naming them as the corner of any other survey. The court held that, though there was an obvious mistake in some one or other of the calls in the survey, yet the beginning corner must be made at the point on the line of A., six hundred and ninety poles from his northerly corner; and that the word "about" must be disregarded,—no corner having in fact been made, and the call being not for any object, but for a mathematical point only. And it was further decided, as to a question of evidence, that statements of a deceased chainman, as to the corner and line trees of a survey, were admissible in evidence; but that his statements as to the locality of the land, and the streams which the boundary lines, would cross, were inadmissible to fix the locality of the survey (*Smith v. Chapman*, 10 *Gratt. R.*, 445).

A case was decided by the English courts, not long ago, in which it appeared that an award, under an act of Parliament, defined the southern boundaries of the P. F. Level colliery thus: "Commencing at the point where the said level struck the coal, and extending in an eastward direction as deep as the said level will drain." There was an old existing excavation (termed by miners a level), not horizontal, but running upward into the coal, eastward from the point where it struck the coal bed. This excavation was described on the plan annexed to the award as the line of boundary. The court held that this existing old level was the boundary meant by the award, and not an imaginary mathematical line drawn horizontally eastward from the point where the old excavation struck the coal (*Brain v. Harris*, 29 *Eng. Law and Eq. R.*, 431).

A case came before the courts of South Carolina, a few years since, wherein it appeared that a deed of conveyance described the land as containing so many acres, "being part of a tract of 11,732 acres, granted to W. M., situate," etc., "bounded," etc., "as will more fully appear by reference to the annexed plat." The Court of Appeals of the State held that the conveyance embraced all the land described by the plat, although a portion of it was

outside of the grant to W. M. (*Evans v. Corley*, 8 *Riv. R.*, 315).

The Supreme Court of Ohio decided a case, some twenty years ago, involving an interesting principle of construction of conveyances of land, in which it appeared that an owner of a large tract of land supposed to be of certain dimensions, and to contain a certain number of acres, made a plat of it, and divided the whole into a certain number of lots, no survey being made, and marked on the plat the number of acres in each lot, and sold the lots by the plat. The court held that the number of acres inscribed was a mere estimate. And it was further held that, when a plat is made part of a deed, it controls courses and distances given. The court also declared that the object of construction is to ascertain the intent of the parties; and when this intent is discovered it governs, unless the language employed renders it impossible to give it effect (*Wolfe v. Scarborough*, 2 *Ohio R., N. S.*, 361).

A case was decided by the Supreme Court of the United States, a few years ago, wherein a grant of land was involved, in which the deed described the land conveyed as "forty arpens front upon forty in depth, along the river called Des Peres, from the north to the south, which is bounded on the one side by the lands of Louis Robert, and on the other by the domain of the king." The court held that the grant was so uncertain in its boundaries as to require a survey to ascertain and establish them; and that such a survey, made under the direction of the land commissioners, was conclusive evidence of the true boundaries (*Stanford v. Taylor*, 18 *How. R.*, 409).

In the State of Maine a grantor owned an undivided moiety of land, in common with the defendant, south of Fore street, and a store and distillery thereon; also, in severalty, two stores on the south side of and upon Fore street. He executed and delivered a deed to the tenant, describing an undivided half of land, and one moiety of the buildings thereon, consisting of a distillery and two stores on the southerly side of Fore street. The Supreme Court of the State held that this deed did not embrace the stores held in severalty (*Jordan v. Mussey*, 37 *Maine R.*, 376). And the same court disposed of a case, involving the construction of another conveyance of land, at about the same time, wherein it appeared that a grantor conveyed a parcel of land, describing it in the deed as "twenty-five acres, more or less," "being the same land I pur-

chased of R. W." The court held that the deed conveyed all the land comprised in the deed of R. W., though, in fact, sixty-seven acres. And the court reiterated the rule that words, indicating quantity in the descriptive part of a deed, when conflicting with words of more accurate description, must yield. Otherwise, however, they are to be regarded as part of the description, and are not qualified by the addition of the words "more or less" (*Pierce v. Funnice*, 37 *Maine R.*, 63).

A very interesting case, calling for the interpretation of a deed of land, was disposed of by the Supreme Judicial Court of Massachusetts, wherein it appeared that one H. conveyed, by the following description, "A certain piece of land, wharf and flats, beginning at a point on the easterly side of Sea street, at the south-westerly corner of D.'s wharf; and from said corner running in a direction of about south, sixty degrees east, bounded northerly on said D.'s wharf and flats to the channel or low-water mark; then beginning again at said corner of D.'s wharf, and running south eleven degrees west by said Sea street one hundred and thirty-three feet; then turning and running in a direction of about south sixty degrees east (parallel with the northern boundary line on said D.) to the channel or low-water mark, and bounded southerly by other lands and flats of me, the said H.; thence running northerly by the channel to the easterly end of said northern boundary line." The course of south sixty degrees east from the south-westerly corner of D.'s wharf coincided with the water line of said wharf for a considerable distance; at the end of which the line of the wharf turned and ran northerly about twenty feet, and then turned again and ran in a line nearly parallel with the first toward the channel. The true line between the flats of H. and the flats of D., commencing at the south-westerly corner of D.'s wharf, ran south forty-five degrees east to the channel. The court held that the northern boundary line of the premises conveyed followed the line of D.'s wharf to the first jog, and then struck the true line between the flats of D. and H., and followed that line to the channel; and that the southern line of the premises conveyed was parallel with the northern line thus established; although both D. and H., at the date of this deed, supposed the true line between their flats to run from the south-westerly corner of D.'s wharf in a straight line to the channel; and although, by the construction given by the court, the southern line of the premises would run so far to

the southward that a small portion of its easterly end would cross flats not owned by the grantor (*Curtis v. Francis*, 9 *Cush. R.*, 427).

A case was disposed of by the Supreme Court of Missouri, involving the construction of a conveyance, in which it appeared that the description in the deed was "a tract of land eight arpens front upon the depth of forty, and as the same exists according to the line of the figurative plan." The court held that the deed did not convey particular land claimed, no extrinsic proof of locality being offered (*Vasquez v. Richardson*, 19 *Mo. R.*, 96). And the same court decided a case, at a subsequent term, wherein it appeared that a lot of land was described in a deed, and stated to be included in the "south-east" corner of a larger tract, and the grantee took possession of a similar tract in the south-west corner of the larger tract, and the evidence adduced showed that this was intended by the parties. The court held that the word "south-east" might be rejected from the description, and the land located according to the rest of the description and the evidence (*Evans v. Greene*, 21 *Mo. R.*, 170).

A lot of land in the State of Maine was conveyed by the following description: "Beginning at a post in the south-westerly line of Court street, thence, etc. (on two lines of the lot), thence between said lots to Court street, thence on Court street to the first-mentioned bound." The fence around the lot included part of the street. The identity of the post referred to was uncertain. The Supreme Court of the State held that no part of the street was conveyed by the deed (*Walker v. Pearson*, 40 *Maine R.*, 152). And in another case before the same court, at about the same time, it appeared that the charter of a railroad corporation empowered them to fix their location, within a certain time, by filing the same with the county commissioners. A track was surveyed, and staked out across the plaintiff's land, but the location was not filed. The plaintiff executed a deed to the corporation of "a strip of land covered by the location of their said railroad, or that may finally be covered by such location." Subsequently the legislature extended the time for fixing the location, and within such extended time a location was fixed by which the railroad crossed the plaintiff's land at a different place from that surveyed and staked out. The court held that the company had no right, under the deed, except in the strip originally surveyed and staked out (*Hall v. Pickering*, 40 *Maine R.*, 548).

An interesting case involving the construction of a deed of land was decided by the Supreme Court of New Hampshire, in 1857, in which it appeared that, prior to 1838, one C. occupied as his homestead a farm containing about 200 acres, and in that year conveyed eighty acres of it to one P., occupying the remaining 120 acres as his homestead till 1841, when he removed from the farm and never returned. In October, 1841, he leased the 120 acres to one K., for three years. In 1843, P. reconveyed to him the eighty acres. Afterward, in July of the same year, C. conveyed to the plaintiff, by mortgage, "all the homestead farm where he formerly lived, and leased to K., or however otherwise described, containing 120 acres, be the same more or less," and subsequently mortgaged to the defendant the eighty acres. The court held that the 120 acres passed by the mortgage to the plaintiff, and not the 200 acres occupied as the homestead by the mortgagor prior to the year 1838 (*Bell v. Sawyer*, 32 N. H. R., 72).

A case was decided, a few years ago, by the Supreme Court of Connecticut, wherein it appeared that the premises, in a deed of land, were described as "the north half of a certain lot of land, with the store standing on said north half," and the whole lot was bounded in said deed, and said north half described as "bounded south on the grantor's own land," and a corner of said store, which was a permanent building, projecting a short distance beyond a line drawn from a point in the middle of the front line of said lot, to a point in the middle of the rear line thereof. The court held that said deed conveyed the north half of said lot as designated by said line, and also so much south of said line as was covered by said store (*Dikeman v. Taylor*, 24 Conn. R., 219). The Supreme Court of New Hampshire, not many years since, decided a case where the description of the land in the deed was, "a certain dwelling-house, being the same in which I now live, and is the same owned by E. W." It appeared that there was land in rear of the house, used by E. W. and the succeeding owners and occupiers in connection with the house, for the purpose of a wood-yard, and essential to its convenient enjoyment as a dwelling-house. The court held that the said land in rear of the house passed with the house as incident to and a part of the house (*Winchester v. Hees*, 35 N. H. R., 43). And the same court held at a subsequent term, that, under the description of a "rope-

walk " in a deed, such land of the grantor will pass as is exclusively devoted to the use of the rope-walk (*Davis v. Hawley*, 37 *N. H. R.*, 65).

The Supreme Judicial Court of Massachusetts recently decided a case, involving the same principles of construction as were involved in the last two cases before the New Hampshire courts. The conveyance was in fee of a house and land, and "also a well of water, with the curbs, pumps, and all utensils belonging to them, as the same now stands in my other land, and a right at all times to pass and repass to and from the said well of water through my said other land, and to set up shears or any other machine on my said land for the purpose of repairing said well of water and the pumps therein, whenever the grantee may think proper so to do; reserving to myself and my heirs and assigns the free and uninterrupted privilege of the hand-pump in the aforesaid well, and of the said well and water at all times." The court held that this deed passed the fee in the land occupied by the well. And the rule was laid down that land, occupied and improved by buildings or other structures designed for a particular purpose, which comprehends its beneficial use and enjoyment, will pass by words which describe that purpose (*Johnson v. Raynor*, 6 *Gray's R.*, 107). And in another case, before the same court, it appeared that a boundary line, described in a deed of land, was "a north and south line to be established two rods east of black-oak, toward the northerly part of said lot and a point of two rocks, supposed to be south of the middle of said lot." The court held that this boundary line was a straight line, and could not be proved to be a crooked line by evidence of the acts of the parties establishing monuments upon the line (*Jenks v. Morgan*, 6 *Gray's R.*, 448). And still another case, decided by the same court, at about the same time, a construction was given to a particular deed. The land conveyed was described in the deed, after an accurate statement of its northern and western boundaries, as bounded "southerly partly on land of B., and partly on the Great Brook, and from the brook to the turnpike road on land set off to H. A.; and bounded northerly on the turnpike road; being all that part of the farm of R. A., deceased, which was set off to A. A. as his share of said farm. For a particular description, reference may be had to the return of the distribution of the estate of R. A. in the probate office." The land of R. extended along the

westerly half of the southern boundary of the land conveyed, and was itself bounded on the south by the Great brook, which extended from the south-east corner of B.'s land eastwardly to the turnpike; and the turnpike ran north-westwardly from the Great brook to the north-east corner of the land conveyed. The report of the partition of the estate of R. A. was lost; but the jury found that the line established thereby between A. A. and H. A. was a continuation of the northern line of B.'s land eastwardly to the turnpike; the land set off to A. A. lying north of that line, and between the northerly and westerly boundaries of this deed and the turnpike, and that set off to H. A., lying south of that line. The court held that the Great brook must be rejected as a monument, as inconsistent with the residue of the description; and that the southern boundary of the land conveyed was the northern line of B.'s land and the division line as found by the jury. And the rule was laid down that a false demonstration, though a reference to a natural monument, may be yielded in construing a deed (*Parks v. Loomis*, 6 *Gray's R.*, 467).

A case came before the Supreme Court of Pennsylvania, a few years since, in which was involved the construction of a deed describing land by a boundary, "beginning at a stake on the north-east corner of E. and K. streets; and thence along the north-east side of said E. street," etc. The court held that the deed conveyed the land to the middle of the street, if the grantor owned so far, as he had not reserved it, although the measurements were from or to the side of the street. And the court declared, as pertinent in the case, that so frail a witness as a stake is scarcely worthy to be called a monument, or to control the construction of a deed (*Cox v. Freedley*, 33 *Penn. R.*, 124).

But the Supreme Judicial Court of Massachusetts decided a case, about the same time, in which was involved a grant of land, described as bounded by certain courses "to a stake by land laid out by the grantor for a street; thence southerly by said street." The court held that the grant extended only to the side of the street, provided it was shown that the stake was there. It was observed, however, that a grant of land "to a street one rod and a half wide, thence northerly by said street," passed the land to the center of the street (*Phillips v. Bowers*, 7 *Gray's R.*, 21). The doctrine of these two cases is not necessarily variant, although they are different in their results. The language of the convey-

ances was not similar in all particulars; and, hence, a different construction was applied.

A peculiar case came before the Supreme Court of Ohio, not long since, in which it appeared that lots, adjoining on the east and west, were sold by numbers, and a plat, at the same time, to A. and B. separately. The lines of division were not designated; but the locations were fixed by reference respectively to known and fixed monuments on the east and west. Each deed described the lots as of the width indicated by the plat, more or less. On measurement, the width thus given would not bring the lots together, while the plat showed they were intended to meet, and that the whole was intended to be sold. The court held that the surplus should be divided between A. and B., in proportion to the lengths of their respective lines shown by the plat, and given in the deeds (*Marsh v. Stephenson*, 7 *Ohio R.*, *N. S.*, 264).

The Supreme Court of Maine, in a case recently before it, where it appeared that the last call in a deed, describing the territory in township No. 21, was from an undisputed point of departure, "thence south-westerly by a line to be run between townships No. 21 and No. 22, to the place of beginning," held that the call repudiated all former lines between the *termini* mentioned, and that the line to be run must be the shortest distance between the points named. And it was decided that a subsequent clause in the deed, "according to a survey and plan of said township by P. and D.," could not control or modify the preceding language. And the court held further, in the case, that an instruction to the jury that another line, admitted to have been run by the proprietors prior to the date of the deed to the plaintiffs, purporting to be the true line between townships 21 and 22, was the controlling monument answering the call, and that the point of departure must be rejected as inconsistent with the other and superior monument referred to in the deed, was incorrect and erroneous (*Grant v. Black*, 53 *Maine R.*, 373). And the same court decided a case, about the same time, wherein it appeared that a party conveyed by deed of warranty certain premises, and described them as follows, to wit: "The north half of the double dwelling-house, erected by S. and situated, etc., together with the land under the same, and the land used with it and belonging thereto, and all out-buildings and fences thereon and thereto belonging, being the same premises heretofore occupied by me as a dwelling-house."

The court held, 1. That the words "belonging thereto" referred to the house, and not to the grantor. 2. That the words "out-buildings thereon" meant the out-buildings on "the land used with" the house. 3. That a barn was one of the out-buildings, and that the deed conveyed such barn and the land on which it stood (*Woodman v. Smith*, 53 *Maine R.*, 70).

In a late case before the Supreme Judicial Court of Massachusetts, it appeared that A. conveyed a lot of land to W., "situate on the northerly side" of a certain street, and "bounded and described as follows: beginning at a point on the line of land of B.; thence by said street north fifty-eight and three-quarters degrees west, about one hundred feet, to a stake and stones at the corner of land of G.; thence north thirty-one and a quarter degrees east to the river; thence by said B.'s land to the first mentioned bound." The court held that the fee of the land to the center of the street passed to W., it appearing that A. was seised thereof at the time of this conveyance (*White v. Godfrey*, 97 *Mass. R.*, 472). And the same court, very lately, disposed of another case involving the construction of a deed, which was somewhat peculiar in its phraseology. The deed under which the claim arose first clearly described all the boundaries of "one piece of land lying the south side of the county road," on both sides of a certain river, bounded on one Cole's land on the west, by a definite line on the south, and by one Bartlett's land on the east. The deed then added, "all the land situate and lying north of the road aforesaid, bounded north of the lines of Matthew Clark's land, and west on" another road distinctly identified. Upon applying the deed to the land, as shown on the plan presented, the court was of the opinion that, taking the whole deed together, the words "bounded north of the lines of Matthew Clark's land" defined the northern boundary of the premises granted. This was thought to be so obviously the only construction which would make the whole description coherent, that the court was ready to hold, if necessary, that the word "of," in this clause of the deed, had been used in its obsolete, but perfectly grammatical, meaning of "by," as in the familiar examples—"run of men"—"led of the spirit"—"tempted of the devil;" although the court more naturally inferred that the scrivener, in writing the description in the deed, had inadvertently used the preposition "of," instead of the word "in," as he did in the next following clause. The court

therefore held that the deed in question included only lands lying compactly together, and not the outlying lot farther to the north, which was separated by the land of Matthew Clark's lines from the other lands described (*Hannum v. Kingsley*, 107 *Mass. R.*, 355). And in another late case, before the same court, wherein it appeared that a part of the description of a boundary was: "Commencing at a point 250 feet north-westerly from Washington street, on the line of a private way, and running north-westerly, * * * easterly, * * * southerly, * * * westerly by the fence, * * * and continuing in the same direction until it comes to said private way or point of beginning," the court held that the east line must be continued on the line of the fence, though it thereby struck the private way at a point nearer than 250 feet to the street (*Needham v. Judson*, 101 *Mass. R.*, 155).

In a late case, decided by the Supreme Court of Pennsylvania, it appeared that a grantor conveyed a subdivision of his land by deed, reciting the last line as identical with his eastern boundary; but, by mistake, the line was located 200 perches west of it. The court held that the calls in the deed were controlled by the line as located; and declared that the mistake did not injure the grantee, he having received all the land he had purchased (*Craft v. Yeane*y, 66 *Penn. R.*, 210).

CHAPTER XVIII.

CASES PASSED UPON BY THE COURTS RELATING TO BOUNDARY OF LANDS ADJOINING THE SEA AND RIVERS, AND OTHER BODIES OF WATER AND STREAMS — CASES MISCELLANEOUSLY STATED.

It may be convenient to have the leading cases which have been decided by the courts, in which particular conveyances have been construed in respect to the boundary of lands upon the sea and other bodies of water and streams, grouped together in one place; and this chapter will, therefore, be devoted to an examination of those cases, but without regard to the chronological order in which they occurred or the places where they were decided. It will have been observed, however, that a few of such cases are

noted in preceding chapters. Some twenty years ago, a case was decided by the Supreme Court of Maine, wherein it appeared that land was described in a deed as containing two and a half acres of salt marsh, and as being within the following bounds: Beginning at a corner by the beach, and running by a given line to a creek, and by the creek to a certain marsh, and then by the marsh to a ditch, and then by the ditch to the beach, and running by the beach to the place begun at. The court held that the land granted adjoined upon the land washed by the waves of the sea, although the quantity of land within the boundaries exceeded that named in the deed, and although the ditch did not extend the whole distance to the beach. And the court further held that the word "beach" must be construed to designate land washed by the sea, and to be synonymous with "shore" (*Littlefield v. Littlefield*, 28 *Maine R.*, 180).

In a case decided by the Supreme Court of Illinois, several years since, it appeared that in a grant, by the United States, of land bordering on a stream not navigable, laid down upon the minutes of the surveyor in his office as meandering, but there was no marked line upon the plat by which the grant was made, limiting the grant to the margin of the stream. The court held that the grantee took to the center thread of the stream, and that the meandered line, run for the purpose of determining the quantity of the land in the fraction, was not a boundary. And the general doctrine was laid down, that the grantee of land, bordering on a stream not navigable, takes to the center of the stream, unless there is an express reservation confining him to the margin; and that he is entitled to recover damages against a party who, to his injury, diverts the water passing over his land from its natural channel (*Canal Trustees v. Haven*, 5 *Gilman's R.*, 548).

A case was decided by the Supreme Court of the State of New York, soon after the present judiciary of the State went into effect, involving the construction of the language in a grant from the State. The patent issued by the State described the land granted as running "north twenty-three degrees east to the river, and thence down along the said river," etc. The court held that, in the absence of any circumstances to control the construction, and to show the actual intention of the parties to be otherwise, this description would afford presumptive evidence of a design to carry the north line of the lot to the middle of the river. But

that it was only presumptive evidence which was liable to be overcome by evidence of a different intent. And in this case, the court was of opinion there was evidence to show that the principle of riparian ownership was not intended to apply to the patent under consideration, and that the grant did not, therefore, carry the grantee to the thread of the stream (*Orendorf v. Steele*, 2 Barb. R., 126). And in a later case before the same court, wherein it appeared that a grant of land from the State described the land to be located as "all that square mile beginning at the mouth of a creek nearly opposite to the head of Grand Isle on the easterly side of the outlet of Lake Erie," and the northern boundary was to run "westerly to the waters of the said outlet, and thence *along the same to the place of beginning*;" it was held that the language employed denoted an intention to stop at the edge or margin of the river. But it was also held in the case that the common-law rule, as applied to the construction of descriptions in a deed bounding the premises by, or along, or upon a river, has no application to lands bounded by the Niagara river, because that river forms a natural boundary between this country and a foreign nation (*Kingman v. Sparrow*, 12 Barb. R., 201). The case had been before decided by the old Supreme Court of the State, and then taken to the Court of Appeals, where the judgment of the Supreme Court was reversed, and a new trial granted, but not on the ground of error in the construction of the grant in the particulars indicated, but upon other grounds entirely; the question of construction, as discussed by the present Supreme Court, does not seem to have been passed upon by the Court of Appeals in any way whatever (*Sparrow v. Kingman*, 1 N. Y. R., 242). And the case, as decided in the 12th of Barbour, has been several times referred to as authority by the Supreme Court, and the construction there put upon the language of the description contained in the grant is doubtless correct.

Another case before the present Supreme Court of New York, involving the interpretation of a conveyance bounding land upon the Hudson river, was elaborately discussed and carefully considered. The deed passed upon by the court described the west line of the premises conveyed as running south "to the north bounds of Hudson river, thence easterly along the said river, so as to include so much of the island as is situated within lot No. 2, which island lies near the said north bounds of Hudson river," etc.

The court held that this boundary carried the grantee to the center of the main channel of the river, and not merely to the bank. The land conveyed was situated upon the river above tide-water, and where the river was not actually navigable. Willard, J., in delivering the opinion of the court, said: "At common law, a grant of land bounded upon the sea-shore, or upon a stream or arm of the sea, where the tide ebbs and flows, conveys to the grantee only that part of the bank which is not covered by the water at the ordinary flood tide. It does not carry with it the lands under the water, the island in the stream, or the right of fishery. In order to pass these, the terms of the grant must be so clear and explicit as to leave no manner of doubt as to the intention of the grantor to part with those rights. But the rule is directly the reverse as to those grants which are bounded on rivers and streams above tide-water. In such cases, if the grant is bounded *on the stream*, or *along the same*, or *on the margin thereof*, or *on the bank of the river*, or where any other words of similar import are used, it legally extends to the middle or thread of the stream; and not only the bank but the bed of the river, and the island therein, and the exclusive right of fishing, are conveyed to the grantee, unless they are expressly reserved, or the terms of the grant are such as to show a clear intention to exclude them from the general operation of the rule of law. * * *

The case under consideration does not fall under any of those which restrict the boundary to the bank, and exclude the river. The west line of the lot runs north till it strikes 'the *north bounds* of Hudson river, thence easterly *along the said river*, so as to include so much of the island as is situated in lot No. 2.' Even the words *along the said river*, are *prima facie* sufficient to indicate the center of the stream as the line. The words *so as to include the island*, etc., were inserted, lest a doubt might be entertained as to which channel of the river would be meant by the words *along the said river*. The word 'bounds' of the river, in this deed, do not indicate the bank or shore of the river, but the center" (*Walton v. Tift*, 14 Barb. R., 216, 218-221).

An interesting case was decided by the Supreme Court of the United States, a few years ago, involving the division line between the States of Alabama and Georgia, the principles of which may be applied in some cases of private property bounded upon rivers and other unnavigable streams. In the boundaries of these States,

as fixed by the contract of cession from the United States, the following clause gave rise to the dispute: "A line up said river and along the western bank thereof." The court held this to include the bed of the river; and the bed of the river was defined to be that portion of the soil which is alternately covered and left bare as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year, without reference to extraordinary freshets of the winter or spring, or the extreme droughts of summer or autumn. That is to say, the court held that the western line must be traced on the water-line of the acclivity of the western bank, and along that bank where that was defined; and in such places on the river where the western bank was not defined (where it ran into great swamps) it must be continued up the river on the line of its bed, as that was made by the average and mean stage of the water, as was before stated. And the court laid down the rule in the case, that a contract of cession between States or the United States and a State, as it respects their respective rights in a dividing river, must be interpreted by the words of it, according to their received meaning and use in the language, as collected from judicial opinions concerning the rights of persons upon rivers, and the writings of publicists in reference to the settlement of controversies between nations and States as to their ownership and jurisdiction on the soil of rivers within their banks and beds; which authorities are to be found in cases in our own country, and in those of every nation in Europe (*Alabama v. Georgia*, 23 *How. R.*, 505).

A late case before the Supreme Court of the State of Maine, involving a water boundary, was this: By a deed of a parcel of land, the east line of which was described, "thence east until it strikes the creek on which the mill stands, thence south-westerly on the west bank of said creek" (which was a small unnavigable fresh-water stream). The court held that by this deed the grantee was restricted to the bank of the creek; that such grant did not extend to the center or thread of the stream, unless there were, in the deed, other words indicating that such was the intention of the grantor. And the court reiterated the rule that, where a grant is bounded upon a non-navigable fresh-water stream, a highway, or ditch, or party-wall, and the like, such stream, highway or other object is deemed to be a monument, located equally upon

the land granted and the adjoining land, and the grant extends to the center of such monument (*Bradford v. Cressey*, 45 *Maine R.*, 9). And the same court decided an earlier case, in which it appeared that the boundary described in the deed was, running "to the pond to a stake and stones." The court held that the grantee was restricted to the stake and stones, if they could be found, or their original location, but if neither could be identified then "to the pond." And the court laid down the well-settled rule, that natural monuments must control both course and distance. And further, that where land is bounded upon a pond, if it is in its natural state, the grant extends only to the water's edge; but the rule is otherwise, where the pond is an artificial one (*Robinson v. White*, 42 *Maine R.*, 209). And in a still earlier case before the same court, the conveyance under consideration bounded the land intended to be granted, generally, on a fresh-water pond, which it appeared had been enlarged by means of a dam at its mouth, and the court held that the deed conveyed the land as far as the low-water mark of the pond, in its enlarged state (*Wood v. Kelley*, 30 *Maine R.*, 47).

An important case came before the Supreme Court of New Jersey, a few years since, in which it appeared that the deed of the land intended to be conveyed described the lot as lying "in the vicinity of and on the margin of New York bay." The court decided that the conveyance made the bay a boundary, and constituted the grantee a shore owner (*State v. Brown*, 3 *Dutcher's R.*, 13).

The Supreme Court of the State of Connecticut recently decided a case involving the construction of conveyances bounding premises on a canal. It appeared that two persons were owners of land in severalty, situated upon both sides of a canal; and they made an exchange, by which one party conveyed to the other all his land east of the canal, and the latter conveyed to the former all his land west of the canal. The land conveyed by the respective deeds was bounded "on said canal." The court held that the intention of the parties, as shown by the language of the deeds and the circumstances of the case, was clearly apparent, that the center of the canal was to be taken as the dividing line between them, and the conveyances were so construed (*Agawam Canal Company v. Edwards*, 36 *Conn. R.*, 476, 500).

And the Supreme Court of California, in the year 1869, decided

a case calling for the construction to be put upon the language of a patent, in which the land was described as "bounded on the south by the sea-shore, on the north by the foot of the ledge of mountains," etc. The patent was for a confirmed Mexican grant of land, and referred to a decree of court, and the plat and survey of the Surveyor-General, giving courses and distances, which decree bounded the land on the sea-shore on one side; but the calls and plat of the survey extended from the interior to the sea-shore, and then extended along the sea-shore in places at and below tide to a point on the shore, and the patent granted the land described in the survey. The court construed the patent as conveying the land only to the high-tide line along the shore. Rhodes, J., delivered the opinion and said: "To ascertain the land granted, the several portions of the patent must be read and construed together. The land confirmed is bounded on the south by the sea-shore; and the land included within the line of survey will also be held to be bounded on the south by the sea-shore, unless the calls imperatively demand other boundaries. When the decree of confirmation fixes the exterior bounds of a rancho, whether it is one granted within specified boundaries, or one of a specified quantity within a large area, the presumption is that the lines of the survey coincide with, or at least do not extend beyond, the exterior limits or bounds of the decree; for the survey is not an independent act, but is an act performed under the decree, and preparatory to its being carried into effect by a patent. Courts will give effect to every part of the description of premises in a deed or grant, if it is possible, consistently with the rules of law; but if this cannot be done, they reject that which is repugnant to the general intent of the instrument. It appears by the plat that, following the *courses and distances* of the survey, portions of the sea will be included in the lines of the rancho. This is inconsistent with the calls of the decree of confirmation, which confirms a tract bounded by the sea-shore. It is a general rule in the construction of grants and deeds of conveyances, containing descriptions of premises, one part of which is inconsistent with or repugnant to another, that visible local objects or monuments, mentioned in the conveyance, will control both courses and distances. The survey mentions the sea-shore as the termination of the fourth course, and the twelfth course commences at the sea-shore; but at the intermediate stations no visible object nor any

monument, either natural or artificial, is mentioned. The call for the sea-shore, as the northern boundary, must be regarded as the more definite and certain, 'and will prevail over a call for a new station,' and over the courses and distances" (*More v. Massini*, 37 Cal. R., 432, 436, 437). In a later case, decided by the same court, the description of the land in the deed before the court was as follows: "Commencing at *low-water* mark in range with a ditch in the line of land occupied by John C. Piercy, running southerly along said ditch to its most southern extent, about one hundred and forty rods; thence westerly along said ditch ten rods to a line of fence; thence westerly along said fence to *low-water* mark, in range with said fence and the west bank of a small creek, running into the bay; thence eastwardly along *low-water* mark to the place of beginning, about forty-five rods." Comparing this description with the actual location of the land, it appeared that if the starting call in the deed was taken, and the lines traced from that point, nearly all the land would consist of marsh and mud flats, lying below high-water mark; and "that the most southern extent" of the ditch on the line of Piercy's land would not be reached; that no cross-ditch, ten rods in length, would be found for a southern boundary, and no fence would be found extending back to the bay from the west end of a cross-ditch, and no mouth of a small creek emptying into the bay for a north-east corner. But by taking the starting point at *high-water* mark, all was consistent and right. The court held that the description should be construed by substituting the starting call in the deed *high*, instead of *low-water* mark. Sanderson, J., delivered the opinion of the court, and, among other things, said: "We do not question the rule upon which counsel relies, that, where there are conflicting calls, those which, from their nature, are *less* liable to mistake must control those which are *more* liable to mistake; or that if the starting call is fixed, certain and notorious, and there is a conflict between it and other calls, the latter must generally give way to the former; but the rule does not go to the extent of declaring that *all* the other calls, although agreeing among themselves, shall be set aside solely because they do not agree with the first. As a general proposition, it is undoubtedly true that mistakes are less likely to occur in relation to the starting point than in respect to the succeeding calls; but this proposition, as we think this case shows, cannot be accepted as universal. It undoubtedly applies

with full force when the starting point is fixed, certain and notorious, as in the case of a well defined monument, and the succeeding calls are courses and distances, or even monuments, which are conflicting or ill defined; but when the succeeding calls are as readily ascertained, and are as little liable to mistake, we consider them of equal veracity with the first; and when they all conflict with the first, and agree with each other, their united testimony must control. It is true that 'low-water mark' on Mission bay is more permanent and lasting than a 'small ditch or furrow;' but both being found upon the ground when looked for, the testimony of the latter is quite as reliable as that of the former (*Piercy v. Crandall*, 34 Cal., 334). In conclusion, upon this branch of the case we deem it proper to say that, in the construction of written instruments, we have never derived much aid from the technical rules of the books. The only rule of much value—one which is frequently shadowed forth but seldom, if ever, expressly stated in the books—is to place ourselves as near as possible in the seats which were occupied by the parties at the time the instrument was executed; then, taking it by its four corners, read it" (*Walsh v. Hill*, 38 Cal. R., 481, 486, 487). And in a still later case, before the same court, a construction was given to the language of a statute which described the territory as "beginning at the stakes monument; thence in a *straight* line to a point on the San Joaquin river seven miles below the mouth of the Merced river." The court held (the stream being declared navigable by statute) that the measurement should be made by the meanders of the river, and not in a direct line. And it was also declared that the same would be the rule where distance is called for upon a traveled highway. Temple, J., delivered the opinion of the court, and said: "There seems to be no conflict whatever in the authorities, that, where a certain distance is called for from a given point on a navigable stream to another point on the stream, to be ascertained by such measurement, the measurement must be made by its meanders, and not in a straight line; and the same rule prevails where distance is called for upon a traveled highway. A different rule is sometimes adopted when the stream is not navigable. Where a tract of land is bounded upon a navigable stream, the distance upon the stream will be ascertained—in the absence of other controlling facts—by measuring in a stright line from the opposite boundaries" (*People v. Henderson*, 40 Cal. R., 29, 32).

In the States of Maine and Massachusetts some rules prevail in respect to the conveyance of "flats," which are peculiar to those States, by reason of an ancient ordinance exclusively applicable to the territory comprising such States, known as the "Ordinance of 1647." A case of this description was decided by the Supreme Court of Maine some twenty years ago, in which it appeared that the owner conveyed a square of land, bounded by the sea, "reserving a street through the square, etc., together with the flats, namely, all my rights to the same in front of said square to the channel." The court decided that the flats passed by the deed. And the court declared the doctrine, as being pertinent to the case, that words of doubtful import in a deed of land should be construed most favorably to the grantee (*Winslow v. Patten*, 34 *Maine R.*, 25). And in an earlier case, before the same court, it appeared that the grantee of land was bounded "on the sea." The court held that, under the deed, the grantee owned the flats for one hundred rods, and no more, from high-water mark, if they extended so far (*Partridge v. Luce*, 36 *Maine R.*, 16). And in an earlier case, before the same court, it appeared that land conveyed was described as one-half of a particular tract of land, "being that part next to and adjoining a particular" river. The court held that the grant extended to the river, and included the flats, notwithstanding there was a particular description in the deed by which the land was "bounded round by the shore," it being understood that the particular description was used by way of reiteration and affirmation of the preceding general words, and did not, therefore, diminish the grant made by the general words (*Moore v. Griffin*, 22 *Maine R.*, 350).

But the question as to what boundary will include the adjoining "flats," has arisen more frequently in the State of Massachusetts than in the State of Maine, although the ordinance of 1647 has been extended to the latter State, notwithstanding the territory now constituting the State of Maine was not under the jurisdiction of Massachusetts when it was made. In one case before the Supreme Judicial Court of Massachusetts, the deed bounded the land "easterly on the sea or flats." The court held that the grant passed the flats as appurtenant to the land conveyed. And the court declared that, in construing the deed thus bounding the land intended to be conveyed, a lease for years, made to the grantee by a former proprietor, and continuing at the date of the

deed, of a shop standing on the land conveyed, and bounded "easterly on the sea or flats of the lessor," if admissible in evidence, had no tendency to prove that the flats appurtenant to the upland were not included in the deed (*Saltonstall v. Long Wharf, 7 Cush. R.*, 195). The same court, in a much later case, gave construction to the deed to the Hancock Free Bridge Corporation, by the proprietors of the West Boston bridge, of their franchise, made pursuant to statute. The deed, in terms, included "all their right, title and interest in and to the causeway, from the westerly abutment of said bridge." The court held that this deed conveyed a fee in the flats owned by the grantors, under said causeway, and under "Little Bridge," a part thereof; and, therefore, that a subsequent deed from the same grantors of a tract of land, adjoining said causeway on the north, by metes and bounds, "together with all the right, title and interest of said proprietors to all the flats adjoining, not previously sold and conveyed," passed no title to the flats south of said causeway and Little Bridge (*Harlow v. Rogers, 12 Cush. R.*, 291). And the same court decided another case at the same term, involving the construction of a deed wherein the land intended to be conveyed was described as all the land "on the easterly side of a creek, meaning to convey all the land between" certain other specified bounds and said creek. The court held that the deed conveyed the flats adjoining to the center of the creek (*Harlow v. Fisk, 12 Cush. R.*, 302).

An important case came before the Supreme Judicial Court of Massachusetts, in 1867, in which some rules were laid down by the court for dividing flats adjoining the sea or tide-water. It appeared that upon a tide-water cove, in which the legal dividing lines of the flats were at right angles with the base line of the cove, three lots of the upland were conveyed by parallel side lines which struck the shore obliquely, the deed of each lot describing it as having a boundary line of a certain number of feet on the shore, together with flats of that number of feet in width to low-water mark. The side lines, if extended over the flats at right angles with the base line of the cove, would give substantially the specified width of flats; but if extended in the same direction as the side lines of the upland, would give a less width, and would, by means of intersecting the legal boundary of the flats belonging to a neighboring estate, afford to one of the lots granted no access to low-water. The court held that the side

lines of the flats were not to be extended in the same direction as those of the upland. And the following rule was laid down: Where the shore line of a tide-water cove does not depart much from a straight line, the flats may be divided by drawing a base line from headland to headland, and running straight lines at right angles with the base line from the ends of the division lines of the upland to low-water mark, even if the sea never ebbs beyond the base line, provided the situation and shape of the channel are not such as to require a different mode of division. Gray, J., delivered the opinion of the court, and, among other things, said: "In the division of flats between the proprietors of lands on the sea shore no general principle is better established than that by which each parcel of flats, unless affected by the peculiar shape of the shore or the terms of particular grants, is to extend directly towards low-water mark, and to be of equal width throughout. In *Gray v. Deluce* (5 *Cush.*, 12), Mr. Justice Wilde, speaking for the whole court, declared it to be a general rule, which was intended, though not expressly stated, by the colonial ordinance of 1647, 'that in all cases, when practicable, every proprietor is entitled to the flats in front of his upland of the same width at low-water mark as they are at high-water mark,' or (which is precisely equivalent) 'of equal width with his lot at high-water mark.' And in *Porter v. Sullivan* (7 *Gray*, 443), Chief Justice Shaw said that the flats of each proprietor 'must be in front of the land, that is, directly to the sea from which the tide flows, by lines as nearly as practicable perpendicular to the line shore, or the line of ordinary high-water mark.' * * * Although the proprietor of land bounding on the sea-shore may sell it with or without the adjoining flats, or with such portion as he pleases of the flats which he owns, the presumption is that any deed of a lot of land with the flats adjoining is intended to pass the grantor's actual right and legal title in the flats appurtenant to or parcel of the lot granted; and it is well settled that the side lines of the upland have no influence in deciding the direction of the dividing lines of the flats, unless referred to as guides in particular grants" (*Stone v. Boston Steel and Iron Company*, 14 *Allen's R.*, 230, 233, 234).

A very learned and elaborate note is appended to the report of a case decided by the Supreme Judicial Court of Massachusetts in 1857, a liberal extract from which is quite pertinent to the sub

ject now under consideration. The learned reporter says: "The general rules for the division of flats among coterminous proprietors, so far as they can be ascertained from the adjudged cases, may be thus stated:

"1st. The intention of the ordinance was, 'if practicable, to give every proprietor the flats in front of his upland, of equal width with his lot at low-water mark' (Wilde, J., in *Gray v. Deluce*, 5 *Cush.*, 12; and see *Deerfield v. Ames*, 17 *Pick.*, 45). Whether the proprietor of upland, even if bounding on a cove, can claim flats in any other direction than toward low-water mark has not been adjudged. The late Chief Justice Shaw and Samuel Hoar, sitting as referees, awarded that he could; Chief Justice Parker and Mr. Justice Wilde were of opinion he could not (*Jones v. Boston Mill Corporation*, 6 *Pick.*, 151, 156; *Rust v. Boston Mill Corporation*, 6 *Pick.*, 161, 167; and see *Thornton v. Foss*, 26 *Maine*, 405).

"2d. The nearest channel from which the tide never ebbs, though not adapted to navigation, is the limit (*Sparhawk v. Bullard*, 1 *Met.*, 107; *Ashby v. Eastern Railroad*, 5 *Met.*, 370; *Walker v. Boston and Maine Railroad*, 3 *Cush.*, 22, 24; *Attorney-General v. Boston Wharf*, 12 *Gray*, 27).

"3d. The direction of the side lines of the flats is not governed by that of the side lines of the upland (*Rust v. Boston Mill Corporation*, 6 *Pick.*, 169; *Piper v. Richardson*, 9 *Met.*, 158; *Curtis v. Francis*, 9 *Cush.*, 438, 442; *Emerson v. Taylor*, 9 *Greenl.*, 43), unless expressly so agreed by the parties (*Dawes v. Prentice*, 16 *Pick.*, 442).

"4th. Where there is no cove or headland, a straight line is to be drawn according to the general course of the shore at high-water, and the side lines of the lots extended at right angles with the shore line (*Sparhawk v. Bullard*, 1 *Met.*, 106; *Porter v. Sullivan*, 7 *Gray*, 443; *Deerfield v. Ames*, 17 *Pick.*, 45, 46; *Knight v. Wilder*, 2 *Cush.*, 210).

"5th. Around a headland, the lines dividing the flats must diverge towards low-water mark (Wilde, J., in *Gray v. Deluce*, 5 *Cush.*, 12, 13; Shaw, Ch. J., in *Porter v. Sullivan*, 7 *Gray*, 443; *Emerson v. Taylor*, 9 *Greenl.*, 46).

"6th. In a shallow cove, in which there is no channel, a base line may be run across the mouth of the cove, and parallel lines drawn, at right angles with the base line, from the ends of the division

lines of the upland to low-water mark (*Gray v. Deluce*, 5 *Cush.*, 12, 13; see *Attorney-General v. Boston Wharf*, 12 *Gray*, 251).

"7th. A deep cove, out of which the tide entirely ebbs at low-water, is to be divided by drawing a line across its mouth, giving to each proprietor a width upon the base line proportional to the width of his shore line, and then drawing straight converging lines from the divisions at the shore to the corresponding points on the base line. This rule (which is substantially that suggested by the magistrates in 1683, ante 521), was first reviewed by Wilde, J., in the hypothetical case of a cove the circumference of which was twice its diameter, or deeper than a semi-circle (*Rust v. Boston Mill Corporation*, 6 *Pick.*, 167, 168). It has since been acted upon in other cases, the reports of which contain no plan or description of the properties of the cases in question (*Sparhawk v. Bullard*, 1 *Met.*, 107; *Wheeler v. Stone*, 1 *Cush.*, 323; and see *Ashby v. Eastern Railroad*, 5 *Met.*, 369, 370; *Deerfield v. Ames*, 17 *Pick.*, 45, 46).

"8th. The direction of the side lines of flats in a cove may be modified by the course of the channel bounding them, or by the position of other channels between part of that channel and the upland (*Walker v. Boston and Maine Railroad*, 3 *Cush.*, 22-24; *Commonwealth v. Alger*, 7 *ib.*, 69; *Porter v. Sullivan*, 7 *Gray*, 448, 449; *Attorney-General v. Boston Wharf*, 12 *ib.*, 251).

"9th. It seems that, after passing the mouth or narrowest part of a cove, the lines may diverge, if necessary to preserve the proportions of different estates (*Walker v. Boston and Maine Railroad*, 3 *Cush.*, 25).

"10th. An agreement of coterminous proprietors, as to the direction of their boundaries, may be proved or presumed from their acts and those of public authorities (*Sparhawk v. Bullard*, 1 *Met.*, 95; *Curtis v. Francis*, 9 *Cush.*, 442, 460, 463, 466; *Adams v. Boston Wharf*, 10 *Gray*, 294; *Attorney-General v. Boston Wharf*, 12 *ib.*, 251; *Rider v. Thompson*, 23 *Maine*, 243; *Treat v. Chipman*, 35 *ib.*, 34). Thus the lines of the flats at the foot of Summer street in Boston have been repeatedly found by juries, under the instructions and with the approval of the court, to be parallel with the line of that street, as established by the select men about 1663 (*Valentine v. Piper*, 22 *Pick.*, 95, 96; *Piper v. Richardson*, 9 *Met.*, 163; *Drake v. Curtis*, 9 *Cush.*, 447, note). In the large cove to the northward of that street the flats were distributed,

according to an agreement made 1673, for the erection of a barricade against the Dutch; but the legal effect of that agreement has been judicially ascertained (*Brimmer v. Long Wharf*, 5 *Pick.*, 135, 138; *Wheeler v. Stone*, 1 *Cush.*, 319, 320; *Commonwealth v. Alger*, 7 *Cush.*, 73; *Colony law of 1681*, 5 *Mass. Col. Rec.*, 310, 311; *Bowditch on Flats*, 4).

“The ordinance of 1647 has been extended by usage to Plymouth, to Nantucket and Dukes county, and to Maine, although none of those were under the jurisdiction of Massachusetts when it was made (*Sullivan on Land Titles*, 285; *Barker v. Bates*, 13 *Pick.*, 258, 260; *Mayhew v. Norton*, 17 *ib.*, 357; *Storer v. Freeman*, 6 *Mass.*, 435; 2 *Dane Ab.*, 701; *Codman v. Winslow*, 10 *Mass.*, 146; *Lapish v. Bangor Bank*, 8 *Greenl.*, 89, 93; *Weston v. Sampson*, 8 *Cush.*, 354; *Commonwealth v. Alger*, 7 *ib.*, 76; *Moulton v. Libby*, 37 *Maine*, 435).

“The rule which has been adopted in Maine for the division of flats among coterminous proprietors, in the absence of any agreement between them, or any adverse possession, is to draw a base line between the two corners of each lot at the shore, and then run a line from each corner, at right angles with the base line, to low-water mark; and, if the side lines diverge from or conflict with each other, to divide equally between the two proprietors the land excluded or included by both lines; and not to allow any subdivision of lots to change the side lines, as required by an earlier division of the upland. How this rule should be applied in a cove so deep as to bring more than two of such side lines into conflict with each other has never been decided (*Emerson v. Taylor*, 9 *Greenl.*, 42; *Kennebec Ferry v. Bradstreet*, 28 *Maine*, 374; *Treat v. Chipman*, 35 *ib.*, 36; *Call v. Lowell*, 40 *ib.*, 31).

“Seisin of flats follows the legal title, unless an exclusive possession is proved (*Codman v. Winslow*, 10 *Mass.*, 151; *Brimmer v. Long Wharf*, 5 *Pick.*, 135; *Rust v. Boston Mill Corporation*, 6 *ib.*, 171; *Wheeler v. Stone*, 1 *Cush.*, 317). Disseisin of flats may be effected by filling them up, or by building a wharf on them and laying vessels at the end of it (*Rust v. Boston Mill Corporation*, 6 *Pick.*, 158; *Wheeler v. Stone*, 1 *Cush.*, 315, 322); and see *Treat v. Chipman* (35 *Maine*, 34). But such use of flats adjoining a wharf does not necessarily exclude their use by others (*Gray v. Bartlett*, 20 *Pick.*, 192; *Deering v. Long Wharf*, 25 *Maine*, 65). Sailing over uninclosed flats, when covered with the

tide, will not constitute disseisin (*Brimmer v. Long Wharf*, 5 *Pick.*, 139; *Drake v. Curtis*, 1 *Cush.*, 415-419; *Curtis v. Francis*, 9 *ib.*, 466), nor will occasionally cutting grass on them (*Commonwealth v. Roxbury*, *ante*, 499; *Thornton v. Foss*, 26 *Maine*, 404); yet see *Clansey v. Houdlette* (39 *Maine*, 457).

“ Since the passage of the ordinance a grant of land bounding on the sea-shore carries the flats, in the absence of excluding words (2 *Dane Ab.*, 691, 699; *Valentine v. Piper*, 22 *Pick.*, 44; *Drake v. Curtis*, 1 *Cush.*, 413). But the owner may sell flats or upland separately (2 *Dane Ab.*, 699, 701; *Storer v. Freeman*, 6 *Mass.*, 439; *Mayhew v. Norton*, 17 *Pick.*, 357; *Commonwealth v. Alger*, 7 *Cush.*, 80; *Porter v. Sullivan*, 7 *Gray*, 445, 447; *Lapish v. Bangor Bank*, 8 *Greenl.*, 91; *Deering v. Long Wharf*, 25 *Maine*, 64). Flats may pass as appurtenances of a wharf or a messuage (2 *Dane Ab.*, 690, 700, 701; *Doane v. Broad Street Association*, 6 *Mass.*, 333, 334; *Ashley v. Eastern Railroad*, 5 *Met.*, 369; *Jackson v. Boston and Worcester Railroad*, 1 *Cush.*, 580; *Commonwealth v. Alger*, 7 *ib.*, 80). Doubtful words are to be taken most strongly against a private grantor (*Adams v. Frothingham*, 3 *Mass.*, 361; *Saltonstall v. Long Wharf*, 7 *Cush.*, 201; *Winslow v. Patton*, 34 *Maine*, 25). Otherwise in public grants (*Commonwealth v. Roxbury*, *ante*, 490).

“ The general principle is, that a boundary by the tide-water passes the flats, but a boundary by the land under the water excludes them. Thus flats are included in a grant bounded ‘ by the harbor ’ (*Mayhew v. Norton*, 17 *Pick.*, 359); ‘ by the sea or salt-water ’ (*Gunn v. Chelsea*, 24 *Pick.*, 77); ‘ by the sea ’ (*Jackson v. Boston and Worcester Railroad*, 1 *Cush.*, 478; *Saltonstall v. Long Wharf*, 7 *Cush.*, 200); ‘ by the creek ’ (*Harlow v. Fisk*, 12 *Cush.*, 302); ‘ on the stream ’ (*Lapish v. Bangor Bank*, 8 *Greenl.*, 92, 93); or ‘ river ’ (*Moore v. Griffin*, 22 *Maine*, 350); or ‘ bay ’ (*Patridge v. Luce*, 36 *Maine*, 19). On the other hand, ‘ by the shore ’ (*Storer v. Furman*, 6 *Mass.*, 439); or ‘ beach ’ (*Niles v. Patch*, 13 *Gray.*, 257); or ‘ flats ’ (*Parsons*, Ch. J., in *Storer v. Furman*, 6 *Mass.*, 439; *Fletcher, J.*, in *Saltonstall v. Long Wharf*, 7 *Cush.*, 200), excludes the flats. See also *Dunlop v. Stetson* (4 *Mason*, 366); *Lapish v. Bangor Bank* (8 *Greenl.*, 90). But the effect of such general words may be controlled by specific monuments or abutments (*Storer v. Furman*, 6 *Mass.*, 440, 441; *Chapman v. Edmonds*, 3 *Allen*, 514). Yet a specific abuttal

must yield, if contrary to the intention apparent upon the whole deed (*Jackson v. Boston and Worcester Railroad*, 1 *Cush.*, 579). A boundary 'by a way' (*Codman v. Winslow*, 10 *Mass.*, 149); 'by the marsh' (*Rust v. Boston Mill Corporation*, 6 *Pick.*, 166); or 'by a cliff' (*Baker v. Bates*, 13 *Pick.*, 256, 261), excludes the flats beyond. A private grant, 'on the sea or flats,' or 'by the sea or beach,' being ambiguous, passes the flats (*Saltonstall v. Long Wharf*, 7 *Cush.*, 195; *Doane v. Willcutt*, 5 *Gray*, 335). 'Harbor' or 'flats' is a monument, which governs course and distances (*Mayhew v. Norton*, 17 *Pick.*, 359; *Curtis v. Francis*, 9 *Cush.*, 435-440, 465; and see *Brimmer v. Long Wharf*, 5 *Pick.*, 135, 139). The court will take into consideration the situation of the parties, the state of the country, and of the thing granted, at the time, in order to ascertain the intent of the parties (*Adams v. Frothingham*, 3 *Mass.*, 352; *Commonwealth v. Roxbury*, 9 *Gray*, 493; *Rider v. Thompson*, 23 *Maine*, 244). A proprietary grant in 1680 of 'a piece of land below high-water mark, to set a shop upon, not exceeding forty feet in width,' extended to low-water mark, if within the hundred rods (*Adams v. Frothingham*, 3 *Mass.*, 352). But a grant of 'a thatch bank' below high-water mark does not pass the flats towards low-water mark upon which no thatch grows (*Lufkin v. Haskell*, 3 *Pick.*, 359). A description of flats as bounded on one side upon a way estops the grantor to deny that there is such a way, but is not a covenant against the acts of third persons. *Parker v. Smith*, 17 *Mass.*, 413; *Howe v. Alger*, 4 *Allen*, 206" (*Commonwealth v. City of Roxbury*, 9 *Gray's R.*, 521-525, note).

The cases noted from the 9th *Gray* arose principally under a local ordinance, and yet they decide principles which may be universal in their application, and they may serve as precedents, or illustrations of many cases in general practice. It will be observed that in the cases where the conveyance is held to carry the title of the grantee of an object, as to the center of a stream, or highway, a ditch, a wall, and the like, the object named for the boundary is mutually beneficial to the owners on both sides. For example, the highway is for the purpose of travel upon, the ditch for drainage, and the wall for a division fence, all for the benefit of both parties. This may be regarded as one, though not the only, reason for the rule adopted in such cases.

CHAPTER XIX.

THE RULES IN RESPECT TO BOUNDARIES OF STATES AND TERRITORIES,
COUNTIES AND TOWNS — SOME ADJUDICATED CASES REFERRED TO —
JURISDICTION IN SUCH CASES.

As a general proposition, the boundaries of all States and territories are defined by the act or edict of the sovereign power by which they are ceded or set off, or by compact between the States after becoming independent political powers; the boundaries of counties by the Constitution or Legislature of the State in which they are located; and the boundaries of towns are settled by the act of the Legislature setting them off. In cases of dispute, therefore, reference must always be had to the act or compact by which the boundary is established. Some rules, however, are recognized upon the subject, which are general in their character, and which may aid in determining the question in such cases.

I. It is a part of the general right of sovereignty, belonging to independent nations, to establish and fix the disputed boundaries between their respective territories; and the boundaries, so established and fixed by compact between nations, become conclusive upon all the subjects and citizens thereof, and bound their rights, and are to be treated, to all intents and purposes, as the true and real boundaries. This is a doctrine universally recognized in the law and practice of nations; and it has been declared, by the highest judicial authority of this country, that the right referred to belongs equally to the States of the federal union, with the exception or limitation provided by the Constitution, that the right be exercised with the consent of Congress. The Constitution declares that "no State shall, without the consent of Congress, enter into any agreement or compact with another State;" plainly admitting that, with such consent, the right may be exercised. This doctrine was recognized by the Supreme Court of the United States in an early case, which came before it on error to the Circuit Court of the United States for the district of West Tennessee. It appeared that the plaintiffs in the Circuit Court instituted an ejectment for a tract of land held under a Virginia military land warrant, situate south of a line called Mathews' line, and south of Walker's line; the latter being the established boundary between the States of Kentucky and Tennessee, as fixed by a com-

pact between these States, made in 1820. By the compact referred to, the jurisdiction over the territory to the south of Walker's line was acknowledged to belong to Tennessee, but the titles to lands held under Virginia military land warrants, and grants from Kentucky, as far south as "Mathews' line," were declared to be confirmed; the State of Kentucky having, before the compact, claimed the right to the soil as well as the jurisdiction over the territory, and having granted lands in the same. The compact of 1820 was confirmed by Congress. The defendants in the ejectment claimed the lands under titles emanating from the State of North Carolina in 1786, 1794, 1795, before the formation of the State of Tennessee, and grants from the State of Tennessee in 1809, 1811, 1812, 1814, in which the lands claimed by the defendants were situated, according to the boundary of the State of Tennessee, declared and established at the time the State of Tennessee became one of the States of the United States. The Circuit Court instructed the jury that the State of Tennessee, by sanctioning the compact admitted, in the most solemn form, that the lands in dispute were not within her jurisdiction, nor within the jurisdiction of North Carolina, at the time they were granted, and that consequently the titles were subject to the compact. The Supreme Court held that the instructions were entirely correct. The decision of the court was based upon the grounds and principles before stated, but there were other ingredients in the case which were thought to be equally decisive of the merits; but the court declared that it was not necessary to put their decision upon that ground, and enunciated distinctly the doctrine laid down in this point (*Poole v. Fleegeer*, 11 *Peters' R.*, 185, 209.)

II. Where the boundary between two States or two nations is a river, the presumption is that the dominion of each extends to the middle of the stream (*Vattel's Law of Nations*, 120). And the same, doubtless, is the rule where the boundary is a lake or large fresh-water body, like the great chain of lakes between the middle States and British America, and Lake Michigan, between the States of Michigan and Illinois and Wisconsin. The *presumption* in these cases is that the boundary of the State or Territory is along the middle of the river or other body of fresh-water; while, in the case of boundary upon the ocean, the line is at high-water mark.

III. The courts will take judicial notice of the boundaries of a

State, and of the local divisions of a State into counties, cities and towns ; that is to say, the acts or statutes defining the boundaries of States, counties, cities and towns are generally regarded as public acts, and courts are bound to take notice of them judicially. The English Court of King's Bench, some fifty years ago, decided that the court would take judicial notice of the general division of the kingdom into counties, because they are continually in the habit of directing their process to the sheriffs of the counties ; and because the counties are mentioned in a great variety of acts of Parliament. But it was declared that the court would not apply the rule with respect to the local situation of the different places in each county, or with respect to the boundaries of counties or the distances of one county from another. Bayley, J., in his opinion, said : " I have before said that this court will take judicial notice of the general division of counties ; but that cannot be extended to the particular parts of counties and their local situation. We know very well that there are many parts of counties separated from the general body of the county. There is a part of the county of Durham which is situated to the north of Northumberland ; and so the parish of Crayke, belonging to the same county, is surrounded by the North Riding of Yorkshire ; and there are many other parts of other counties similarly situated."

Holroyd, J., said : " I am of the same opinion. The present objection will be valid, unless the court are bound by law to take judicial notice, not only of every county, but of the local situation of every place in any county ; and I think that they are not bound so to do. I agree that this allegation, taken altogether, must be taken as a positive allegation that the vessel was found within eight leagues of a part of the county of Suffolk. For, though part of this allegation is under a *videlicet*, it is, nevertheless, sufficiently certain. But assuming that to be so, still the court cannot take judicial notice of the local situation of Oxfordness."

Best, J., observed : " It ought to be quite clear, in a case like the present, that a party detaining a prisoner has authority by law so to do. It ought, therefore, to appear, on the face of the return, that the case is brought accurately within the provisions of the act of Parliament ; now that has not been done here. We ought, it is true, to take judicial notice of the counties of England, and of those which are maritime counties, as being noticed in a variety

of acts of Parliament. But we cannot do this with respect either to the local situation of the different places in each county, nor of the distances of one county from another. It seems to me, therefore, that we cannot take notice, judicially, either that Oxfordness may not be an isolated part of the county of Suffolk; or, even if it be part of the body of that county, that it is not within eight leagues of Beachy Head" (*Deybel's Case*, 4 *Barn. & Ald. R.*, 243, 246-248).

But, as a general rule, the courts in this country take judicial notice of the boundaries of States, cities and towns. The Supreme Court of Illinois, at an early day in the history of the State, held that statutes defining the boundaries of counties are public acts, and that courts were bound to take notice of them judicially (*Ross v. Reddick*, 1 *Scammon's R.*, 73). And the Supreme Court of Delaware held, in one case, that the courts there will judicially take notice that Camden is in Kent county (*The State v. Tootle*, 2 *Harrington's R.*, 541).

The Supreme Court of the State of Rhode Island, not long since, held that courts are bound to take cognizance of the boundaries in fact claimed by the State, and should exercise jurisdiction accordingly. But it was declared that where the boundary line of the State is, *de jure*, is a political question with which the courts will not intermeddle (*The State v. Dunwell*, 3 *R. I. R.*, 127).

The old Supreme Court of the State of New York has several times held that courts will take notice of the civil divisions of the State, and the counties in which the several towns are located (*The People v. Bruse*, 7 *Cow. R.*, 429; *Vanderwerker v. The People*, 5 *Wend. R.*, 530; *Chapman v. Wilber*, 6 *Hill's R.*, 475); while the Supreme Court of Maine has held that courts take notice of the local divisions of the State into counties, cities and towns, but that they are not bound to take judicial notice of the local situation and distances of places in counties from each other (*Goodwin v. Appleton*, 9 *Shep. R.*, 453). And the Supreme Court of Ohio has held that the subdivisions of the refugee fractional township in that State will not be judicially noticed, and that they must, therefore, be set up and proved (*Stanberry v. Nelson*, *Wright's R.*, 766). But this is really a rule of evidence, and, perhaps, may be more appropriately considered in another place.

In respect to the boundary lines of some of the States, the

Supreme Court of Illinois has recently held that as much of Lake Michigan as is included by a line running north from the point where the eastern boundary of Illinois strikes the southern bend of the lake to a point in the middle of the lake, in north latitude 42 degrees and 30 minutes, and thence west along that parallel, is undeniably within the limits of Illinois; and it was observed by the court that it was true that no portion of that body of water had been assigned to the counties bordering upon it, or received in any manner the attention of the Legislature, yet it is, nevertheless, a portion of the navigable waters of the State and of her territory. Breese, Ch. J., delivered the opinion of the court, and, upon this subject, said: "The counsel for the appellant are surely mistaken when they say this State has no other waters naturally navigable within its territory, except rivers. By the act of Congress, prescribing the boundaries of this State, and by the Constitution of the State, conformable thereto, it will be perceived no inconsiderable portion of Lake Michigan is within our territorial limits. The maps do not show it; yet the fact is, nevertheless, so, that so much of the lake as is inclosed by lines, on running north from the point where our own eastern boundary strikes the southern bend of the lake to a point in the middle of the lake, in north latitude 42 degrees 20 minutes, and thence west along that parallel, is undeniably within our limits. It is true, no portion of this vast body of water has been assigned to the counties bordering upon it, or received in any manner the attention of the Legislature. Yet it is, nevertheless, a portion of the navigable waters of this State and of our territory." (*The Norway v. Jensen*, 52 Ill. R., 373, 380).

The Circuit Court of the United States for the district of Maine decided, in 1822, that the true line of territorial boundary between the United States and the English territories, on the bay and waters of the Passamaquaddy, is the middle of the stream, or channel of the river, between the territories of the nation, calculating from low-water mark. And it was held that a different line agreed on by the collectors of revenue could not be regarded as of any validity. And the doctrine was laid down that, where there is no exclusive occupancy of a river or bay, the law of nations gives to the nation inhabiting each side the right to go to the middle of the stream, calculated from low-water mark, as the limit of its territorial boundary (*The Fame*, 3 Mason's R., 147).

The Supreme Court of the United States, in the year 1851, decided that, where one sovereign State makes a cession of land to another, bounding the grant by a river, and describing the line not only as commencing on the bank, but also as running up the river and along the bank thereof, the latter words, "along the bank," exclude the intendment that would otherwise prevail, that the line should run along the thread of the stream. And it was declared that the limit, on and along the bank of the river, must be where the bank and the water meet in its bed within the natural channel or passage of the river. And it was further decided that the words in such grant, "along the bank thereof," was the controlling call in the interpretation of the cession; that it excluded the idea that a line was to be traced at the edge of the water, as that might be at one or another time, or at low-water or the lowest low-water; that water was not a call in the description of the boundary, though the river was; and that these did not mean water alone, but banks, shores, water and the bed of the river; that if water, as one of the river's parts, had been meant, it would have been so expressed; that the bank was the fast land which confines the water of the river in its channel or bed in its whole width, and that that was to be the line; that both bank and beds are to be ascertained by inspection; and that the line was where the action of the water has permanently marked itself upon the bank, rejecting altogether the attempt to trace the line by either ordinary low-water or low-water. And the court observed that these terms are only predicable of those parts of rivers within the ebb and flow of the tides, to distinguish the water-line at spring or neap-tide (*Howard v. Ingersoll*, 13 *How. R.*, 381, 416).

The same court held, at a much earlier day, that, when a great river is the boundary between two nations or States, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when one State is the original proprietor, and grants the territory on one side only, that it retains the river within its own domain, and the newly erected State extends to the river only, and the low-water mark is its boundary. It was accordingly decided that the boundary of the State of Kentucky extends only to low-water mark on the western or north-western side of the River Ohio; and does not include a peninsula, or island, on the western or north-western bank, separated from the main land by a channel or bayou, which

is filled with water only when the river rises above its banks, and is, at other times, dry. And the doctrine was laid down that if a river, subject to tides, constitutes the boundary of a State, and at flood the waters of the river flow through a narrow channel round an extensive body of land, but recede from that channel at ebb, so as to leave the land it surrounds at high-water connected with the main body of the country, this portion of territory will scarcely be considered as belonging to the State on the opposite side of the river, although that State should have the property of the river. And it was very properly suggested that, in great questions which concern the boundaries of States, where great natural boundaries are established in general terms, with a view to public convenience and the avoidance of controversy, the great object, where it can be distinctly perceived, ought not to be defeated by those technical perplexities which may sometimes influence contracts between individuals (*Handly's Lessee v. Anthony*, 5 Wheat. R., 374).

The Supreme Court of the United States have twice adjudged that the western boundary of the State of Georgia is on the west bank of the Chattahoochee river; that is to say, the State of Georgia, in 1802, ceded to the United States all the land "west of a line beginning on the western bank of the Chattahoochee river," and "running thence up the said River Chattahoochee and along the western bank thereof." The court held that the State of Georgia retained the bed of the river as far as the natural line, marked by the action of the running water dividing the bed of the river from the western bank (*Howard v. Ingersoll*, 13 How. R., 381). And the same view was taken by the same court in a later case, and the line indicated was declared to be the true boundary between the States of Georgia and Alabama (*Alabama v. Georgia*, 23 How. R., 505).

It has been decided by the Supreme Court of the United States that the eastern boundary of the State of Missouri is the middle of the Mississippi river. The line has not been thus established in a case directly between the State of Missouri and either of the adjoining States; but it has been declared in other cases involving the question (*Jones v. Soulard*, 24 How. R., 41; *Schools v. Risle*, 10 Wall. R., 91). And the same high court has authoritatively fixed the boundary line between the State of Missouri and the State of Iowa. The case before the court was substantially the

following: The western and north-western boundary lines of the State of Missouri, as described in the first article of the Constitution of that State, were as follows: from a point in the middle of Kansas river, where the same empties into the Missouri river, running due north along a meridian line to the intersection of the parallel of latitude which passes through the rapids of the River Des Moines, making said line correspond with the Indian boundary line; thence east from the point of intersection last aforesaid, along the said parallel, to the middle of the channel of the main fork of the said River Des Moines, etc. etc. The Constitution of the State of Missouri was adopted in 1820; but in 1816 an Indian boundary line had been run by the authority of the United States, which, in its north course, did not terminate at its intersection with the parallel of latitude which passed through the rapids of the River Des Moines, and, in its east course, did not coincide with that parallel or any parallel of latitude at all. The State of Missouri claimed that this north line should be continued until it intersected a parallel of latitude which passed through certain rapids in the River Des Moines, and from the point of intersection be run eastwardly along the parallel to these rapids. The State of Iowa claimed that this Indian boundary line was protracted too far to the north; that, by the term "rapids of the River Des Moines," was meant certain rapids in the Mississippi river known by that name, and that the parallel of latitude must pass through these rapids; the effect of which would be to stop the Indian boundary line in its progress north before it arrived at the spot which had been marked by the United States surveyor. While Iowa remained a Territory, the United States recognized the Indian boundary line by treaties made with the Indians, by the acts of the general land office, and by congressional legislation. On the other hand, there were no rapids in the River Des Moines so conspicuous as to justify the claim of Missouri. The court held that the southern boundary line of Iowa was coincident with, and dependent upon, the northern boundary line of Missouri; that Iowa was bound by the acts of the United States, its predecessor, done while the government of the United States had plenary jurisdiction over the subject, that is, as long as Iowa remained a Territory; and, therefore, the court adopted the old Indian boundary line as the dividing line between the two States,

and decreed that it be run and marked by commissioners (*Missouri v. Iowa*, 7 *How. R.*, 660).

The Court of Appeals of the State of New York have lately decided that the boundary line between that State and the State of New Jersey, south of the forty-first degree of north latitude, is the middle of the Hudson river, of the Bay of New York, of the waters between Staten Island and New Jersey and of Raritan bay to the main sea, except that the islands embraced in these waters and lying west of the middle thereof belong to and are under the jurisdiction of the State of New York. And the court held that the State of New York had exclusive jurisdiction over the waters to low-water mark on the New Jersey shore, and over ships, vessels and craft of every kind afloat in the bay of New York and Hudson river, south of Spuyten Duyvil creek, for quarantine and health purposes, the protection of passengers and property, to secure the interests of trade and commerce, and to preserve the public peace. It was declared, however, that it was a qualified and limited jurisdiction, for police and sanitary purposes, and to promote the interest of commerce. And the court laid down the general proposition, that each State has absolute control over its own soil and everything annexed or attached thereto, and over all vessels attached to the piers or wharves, and lying in the docks upon its own shore, or aground on its shore, and over the persons or property of such wharves, docks or vessels, except that all such vessels in the Bay of New York and Hudson river are subject to the quarantine or health laws, and laws in relation to passengers enacted by the State of New York. The court also held that the State of New Jersey has exclusive jurisdiction and control over the piers, wharves, docks and other improvements erected or to be erected on the shores of that State; that this jurisdiction extends to and embraces the whole subject of such improvements, and includes the power to prescribe when, where and how they shall be erected, and to exercise all control over them which government can possess over property of its citizens. And the majority of the court decided that the courts of the State of New York have no jurisdiction to restrain the erection or order the removal of structures extending into the bay or river from the New Jersey shore; even if they are a public nuisance, as affecting injuriously the general and common use of those navigable waters. These several propositions were laid down, in con-

formity with a very able and exhaustive opinion by E. Darwin Smith, J., who examined, at great length, the documents, laws and ordinances affecting the subject of the territorial boundary between the two States. Earl, Ch. J., also delivered a very able and elaborate opinion in the case, agreeing in the main with the majority of the court, but dissenting from the decision in respect to the want of jurisdiction of the New York courts, as contained in the proposition last stated. The whole case is calculated to shed much light upon the important questions examined by the court (*The People v. The Central Railroad Company of New Jersey*, 42 N. Y. R., 283-316).

In a controversy between the States of Kentucky and Missouri before the Supreme Court of the United States, in 1870, it was incidentally decided that all of the States bounded upon the Mississippi river were bounded by the middle of the channel of that river. And it was directly decided that Wolf Island, in the Mississippi river, about twenty miles below the mouth of the Ohio, is a part of the State of Kentucky, and not a part of the State of Missouri, for the reason that it appeared, from the testimony, that such island is situated east of the main channel of the river, as it was at the time the boundary between the States was fixed. Mr. Justice Davis delivered the opinion of the court, and examined the questions involved at considerable length. A short extract from the opinion contains important principles, and is here inserted. The learned justice said: "It is unnecessary, for the purposes of this suit, to consider whether, on general principles, the middle of the channel of a navigable river which divides coterminous States is not the true boundary between them, in the absence of express agreement to the contrary, because the treaty between France, Spain and England, in February, 1763, stipulated that the middle of the River Mississippi should be the boundary between the British and the French territories on the continent of North America. And this line, established by the only sovereign powers at the time interested in the subject, has remained ever since as they settled it. It was recognized by the treaty of peace with Great Britain of 1783, and by different treaties since then, the last of which resulted in the acquisition of the Territory of Louisiana (embracing the country west of the Mississippi) by the United States in 1803. The boundaries of Missouri, when she was admitted into the Union as a State in

1820, were fixed on this basis, as were those of Arkansas in 1836 (3 *Stat. at Large*, 545; 5 *ib.*, p. 50). And Kentucky succeeded, in 1792 (1 *Stat. at Large*, 189), to the ancient right and possession of Virginia, which extended, by virtue of these treaties, to the middle of the bed of the Mississippi river. It follows, therefore, that if Wolf Island, in 1763, or in 1820, or at any intermediate period between those dates, was east of this line, the jurisdiction of Kentucky rightfully attached to it. If the river has subsequently turned its course, and now runs east of the island, the status of the parties to this controversy is not altered by it, for the channel which the river abandoned remains, as before, the boundary between the States, and the island does not, in consequence of this action of the water, change its owner (*Heffter, Du Droit International*, p. 143, § 66; *Caratheodéry, Du Droit International*, 62)." The learned justice then carefully and critically examined the evidence in the case, consisting of the testimony of living witnesses, the physical changes and indications at and above the island, and the maps and books produced by the complainant, remarking that, in a controversy of the nature of the case at bar, when State pride was more or less involved, it was hardly to be expected that the witnesses would all agree in their testimony, and hence it was necessary to consider the evidence somewhat in detail, which was done, and the conclusion was reached that "the State of Missouri has no just claim to the possession of Wolf Island" (*Missouri v. Kentucky*, 11 *Wall. R.*, 395, 401-411).

At the same term of the Supreme Court of the United States it was decided that such court had original jurisdiction, under the Constitution, of controversies between States of the Union concerning their boundaries; and that this jurisdiction was not defeated because in deciding the question of boundary it was necessary to consider and construe contracts and agreements between the States, nor because the judgment or decree of the court may affect the territorial limits of the jurisdiction of the States that are parties to the suit. And the court accordingly adjudicated the question before it, and decided that the counties of Jefferson and Berkely, formerly belonging to the old State of Virginia, have become and now belong to the new State of West Virginia (*Virginia v. West Virginia*, 11 *Wall. R.*, 39). And the same high court decided, in 1838, that such court had jurisdiction of a bill filed by the State of Rhode Island against the State of

Massachusetts, to ascertain and establish the northern boundaries between the States, that the rights of sovereignty and jurisdiction be restored and confirmed to the plaintiffs, and they be quieted in the enjoyment thereof and their title, and for other and further relief (*The State of Rhode Island and Providence Plantations v. The Commonwealth of Massachusetts*, 12 *Peters' R.*, 657; and *vide same case in 14 ib.*, 210, and in 15 *ib.*, 233).

CHAPTER XX.

REMEDIES AND PROCEEDINGS TO DETERMINE UNSETTLED BOUNDARIES —
 * WHEN THE QUESTION MAY BE SETTLED AT LAW — STATUTORY TRIBUNALS TO SETTLE BOUNDARIES — THE FRENCH AND ROMAN CODES —
 LEGAL REMEDIES IN THE AMERICAN STATES — SETTLING DISPUTED BOUNDARY BY PAROL AGREEMENT.

A FEW suggestions become necessary in respect to the remedies in cases where boundaries of real property have become confused or the question of boundary lines is in dispute. The form of proceeding in such cases is often prescribed by statute. By the French Code, every proprietor may compel his neighbor to determine the boundaries of his contiguous properties, and the method of proceeding is pointed out. In such cases, the expense of determining the boundaries must be at the common expense of the adjoining proprietors (*Code Napoleon, article 646*).

In respect to the Roman method of determining boundaries, Dr. Colquhoun, a British statist, gives the following account: "The Twelve Tables and *lex manilia* provided for the appointment of *agri mensores*, or professional engineers, who were enabled to determine questions of confused boundary without difficulty, for the Romans had the most exact surveys, not only of Italy, but also of the provincial lands, municipalities and colonies; and so accurate were these, that not only were the mere boundaries or contiguous estates laid down, but even the hedges and olive trees, together with the number of slaves, buildings, etc., were marked or scheduled. These maps were engraved on tablets of brass, and deposited in the *Ærarium* at Rome; in the case of municipalities and the like, the original was preserved in the like manner, but a

copy, printed off on linen from the engraving, was sent to the locality to which it applied. These surveys being made on an accurate scale, there was, therefore, very little difficulty in an *agrimensor* ascertaining the exact spot, and by measuring from any fixed points, about which he entertained no doubt, he could easily settle a boundary in a far more satisfactory manner than by examining peasant people who had attained fabulous ages, which render them decrepit in body and imbecile in mind. * * * Not only the boundary must have been declared, but the *id quod* interest was to be compensated, with mesne profits realized and every damage. The judge investigated the whole boundaries, taking the evidence from landmarks, the courses or witnesses, with the power of summoning the assistance of civil engineers, or viewing the locality. If the dispute could not be otherwise terminated conveniently, he might adjudicate an appropriate piece of another's land, to be paid for at such estimation as he might think fit" (*Colquhoun's Summary of the Civil Law*, § 2179).

Upon this subject Mr. Justice Story, referring to Domat, Coke on Littleton, Hargrave's Notes, and the Digest, for authority, observes: "The civil law was far more provident than ours upon the subject of boundaries. It considered that there was a tacit agreement, or duty, between adjacent proprietors to keep up and preserve the boundaries between their respective estates; and it enabled all persons, having an interest, to bring a suit to have the boundaries between them settled; and this, whether they were tenants for years, usufructuaries, mortgagees or other proprietors. The action was called *actio finium regundorum*; and if the possession was also in dispute, that might be ascertained and fixed in the same suit; and, indeed, was incident to it. Perhaps it might not have been originally unfit for courts of equity to have entertained the same general jurisdiction in cases of confusion of boundaries, upon the ground of enforcing a specific performance of the implied engagement or duty of the civil law. Such a broad origin or exercise of the jurisdiction has, however, never been claimed or exercised" (1 *Story's Equity Jur.*, § 614).

In England there is an act of Parliament relating to the management of the queen's woods and forests, which contains several provisions enabling the commissioners of woods and forests to settle disputes and differences touching the boundaries or extent of lands within their jurisdiction; and such commissioners are,

moreover, empowered to inquire into trespasses, encroachments, and inclosures, which have been made on the royal forests (10 *Geo. IV, chap. 50*, §§ 94, 96, 98, 100).

In many of the American States the Legislatures have provided for special tribunals to settle disputes in respect to questions of boundary between adjoining owners of land. For example, in the State of Maine the statute provides that, in case of a controversy between adjoining towns, the court may appoint commissioners who are required to ascertain and determine the line or lines in dispute, and the method of proceeding is prescribed (*Revised Statutes of 1871, chap. 3, § 40*).

The courts have held that, in such cases, the validity and efficacy of the proceedings of the commissioners must be determined upon the facts appearing on the reports; and that if the report does not "ascertain and determine" the line, the "controversy" is not terminated, and commissioners may be appointed on a new petition. And it was accordingly held, in one case, that a report declaring that the commissioner do "award and determine" that a certain defined line "shall be the true boundary," etc., did not make it certain that they did not establish a new line, instead of ascertaining and renewing the old one; and, hence, that the report was insufficient (*Lisbon v. Bowdoin*, 53 *Maine R.*, 324). And it would seem that, in the State of Maine, an action may be maintained to determine the boundary line between the adjacent lands of two parties in dispute (*Chase v. White*, 41 *Maine R.*, 228).

In the State of New Hampshire there is a statute which empowers the court to appoint a committee to ascertain the boundary line between two adjoining towns (*Revised Statutes, chap. 37, § 6*). And the Supreme Court of the State has held that the judgment of the Court of Common Pleas, upon the report of a committee, under the provisions of that statute, is a judgment *in rem*, and conclusive upon all persons. It is held that the effect of such a judgment is not merely prospective. It is an adjudication not only of where the line is, but where it always has been since it was established by the incorporation of the town; and is, therefore, conclusive upon the parties in a suit against one of the towns, pending when the judgment was rendered, and in which was involved an inquiry into the location of the boundary. And it was held further, in the case, that the proceeding of the select

men of the adjoining towns, in perambulating the line and renewing the marks and bounds, are not conclusive evidence of its true location (*Pitman v. Albany*, 34 N. H. R., 577).

In the State of Connecticut a statute exists which provides as follows: "Whenever the boundaries of lands between two or more adjoining proprietors shall have been lost, or by time, accident or any other cause shall have become obscure or uncertain, and the adjoining proprietors cannot agree to establish the same, one or more of said adjoining proprietors may bring his petition in equity to the Superior Court for the county in which such lands or a portion of them are situated, and such Superior Court, as a court of equity, may, upon such petition, order such lost and uncertain bounds to be erected and established; and, for that purpose, may appoint a committee of not more than three able, judicious and disinterested freeholders of this State, who shall issue due and reasonable notice to all parties in said lands to appear before them; and said committee shall take the oath hereinafter provided, and shall, as soon as may be, inquire into the facts and proceed to erect and establish such lost and uncertain bounds, and, when necessary, may employ a surveyor to assist therein; and said committee shall, as soon as may be, report the facts and their doings to the Superior Court, pursuant to their appointment; and if said court shall find said parties have been duly notified and heard, or had an opportunity to be heard, they may approve and by decree confirm the doings of said committee; and certified copies of said report and decree shall be recorded in the records of the town or towns in which said lands are situated; and the bounds so erected and established shall be the legal bounds between said adjoining proprietors" (*Conn. Gen. Statutes*, 543, § 33).

The Connecticut statute, providing the means for restoring lost or uncertain boundaries, contemplates a proceeding in equity to effect the purpose; and, hence, the equitable powers of the court are extended to many cases which they would not reach, except for the statute. Under this statute the Supreme Court of Errors of the State have decided that it is not necessary for the court, by a preliminary hearing, to determine whether there is in fact a lost or uncertain boundary, but that the question may properly be referred to the committee with the rest. The proceeding is a statutory one, and the court hold that the object of the statute was not, by this summary proceeding, to determine the title to

land, or settled, disputed or uncertain lines between adjoining proprietors, but to restore the marks of dividing lines that have once existed, and have been displaced or destroyed or have become obscure. Hinman, Ch. J., delivered the opinion of the court, and, after repeating the language of the statute, and referring to a prior case decided by the same court, observed: "It was not the intention of this statute to withdraw cases relating to the title to land from the ordinary tribunals, assisted as they are in respect to the finding of facts by a jury. The Legislature intended to guard against this abuse of the statute in the first clause of it, which limits the action of the court, as a court of equity under it, to cases where the *boundaries* between adjoining proprietors have been lost, etc. And by boundaries, as here used, is obviously meant the ordinary monuments intended to mark the line between adjoining proprietors. It presupposes that such monuments once existed, and have ceased to exist, or that they have become so obscure as to require the erection of new ones. It was not intended that every uncertain line of division between adjoining proprietors should be definitely fixed by a committee of the Superior Court. Suppose a proprietor had encroached upon an adjoining proprietor for so long a time and under such circumstances that he could not be divested of his possessions, no one would claim that he could call upon the court to fix a boundary for him up to the line that he had occupied; and there is little reason for claiming that his adjoining proprietor could call upon the court to determine by a committee where the original line really was, so long as the original monuments which defined that line remained. The object is not to try the question of title on either side of the line, but to mark the place of the old line where the ancient monuments are gone" (*West Hartford Ecclesiastical Society v. The First Baptist Church in West Hartford*, 35 Conn. R., 117, 119, 120). But the same court had previously decided that the statute under consideration, which was passed in 1859, conferred a jurisdiction upon the said Superior Court, in respect to ascertaining lost boundaries, which was not dependent on the want of adequate remedy at law. And, therefore, it was held that the court acts under the statute as in ordinary cases in equity, and is not bound to confirm the doings of the committee in such cases, but may, where the facts reported are not sufficient to justify a decree for the petitioner, dismiss the bill. The court fur

ther held that a lost or uncertain boundary, under the statute, is a boundary which has lost its distinctive character as such by removal, displacement, decay or change, so that it no longer answers the purpose of a bound in defining the true line, and that it was immaterial whether the same was a natural or artificial object. Butler, J., delivered the opinion of the court; and in the course of his remarks he gave the history and purpose of the law under consideration. He said: "The importance of having fixed bounds between adjoining proprietors was recognized early in the history of the State. In 1719, when all equity power remained in the General Assembly, and when every adjoining proprietor was required to bound every parcel of his land 'with sufficient mere stones, at least eighteen inches long, whereof six inches should be above ground,' under a penalty of one dollar and sixty-seven cents per month, and perambulate his lines once a year if requested by the adjoining proprietor, under a penalty of eighty-four cents per day for every day he should refuse, an act was passed providing for the 'fixing' of 'lost bounds' between adjoining proprietors by freeholders, appointed by an assistant or justice of the peace. But that act transferred no title or possession, and prevented no proceedings at law; and, unless acquiesced in, the only effect was to make a *prima facie* case in favor of the plaintiff. That statute was practically of little use, for the want of force and finality in the proceedings, and was omitted in the revision of 1821. In 1832 another statute was passed of substantially the same character, with a provision that if the parties did not abide the action of the freeholders, and litigation ensued, the plaintiff, if unsuccessful, should pay double cost. That statute was also found to be of little practical importance for the same reason; and in 1859 the statute in question was passed, placing the power in the Superior Court '*as a court of equity*,' for the obvious and necessary purpose of making its decree final and conclusive upon the parties, and giving it all the effect of a decree in equity. We think it entirely clear, therefore, that the parties stood before the court as in any other case where the facts have been found by a committee, and their report is accepted, establishing them as the facts of the case on which the court is to act; and that it is competent for the court to disapprove the doings of the committee and dismiss the petition, or approve, confirm and establish them by suitable decree; and that the question whether the facts will justify the

erection of the bounds fixed by the committee, and their establishment by this court, is now legitimately before this court." After referring to the facts of the case, the learned judge proceeds: "What, then, is a lost boundary? It is a boundary which has lost its distinctive character as such by removal, displacement, decay or change, so that it no longer answers the purpose of a bound in defining the true line between the tracts. And it is immaterial whether it be a natural object or an artificial one. A tree that has been turned over with its roots by a gale, and is lying in the vicinity, but away from the corner or the line, has lost its place and its distinctive character as a bound. So if cut down, and the stump has decayed and become invisible. So of a stone which has been displaced, although remaining near the place. And so of the mouth of a stream which has been filled by a sudden avulsion, and has broken for itself a new mouth at a distance more or less remote from the line. It has *lost*, by a sudden removal from its place, or a series of sudden removals from the line, its character as a bound, and, although once certain, has become uncertain and unreliable as a boundary" (*Perry v. Pratt*, 31 Conn. R., 433, 441-443). The common-law remedies in cases of disputed boundaries may still be resorted to in the State of Connecticut, notwithstanding the provisions of the statute which have been considered; and in most cases it is very obvious the old remedies must be invoked for the purpose of settling the matter in controversy.

By an act of the Legislature of the State of Pennsylvania, jurisdiction is conferred upon the Supreme Court and the Court of Common Pleas of Philadelphia county respectively, "all and singular the jurisdiction and powers of a Court of Chancery in all cases of disputed boundaries between adjoining and neighboring lands within said county, whether the parties owning the same hold or claim to hold under the same or different titles" (*Laws of 1858*, p. 267). And by a supplement to that act it is declared "that the jurisdiction and powers given, by the act to which this act is a supplement, to the courts therein named, shall extend to and embrace the ascertainment and adjustment of disputed boundaries between adjoining and neighboring lands in the county of Philadelphia, where such boundaries are or shall have become confused or rendered uncertain, either by lapse of time, by natural causes, or by the act, neglect or default of any present or former

owner or occupant thereof" (*Laws of 1859, p. 359*). It will be observed that these acts of the Pennsylvania Legislature are confined in their operation to the county of Philadelphia, and, being local in their effects, the Supreme Court of the State has declared that they are not entitled to be regarded with any unusual favor by the courts, and are not to be extended by construction beyond what their language plainly imports. It will also be observed that it is only the jurisdiction of a court of chancery which is conferred by the acts. The Supreme Court of the State has therefore held that the acts are confined to cases which are properly the subject of equitable jurisdiction. Sharswood, J., who delivered the opinion of the court, said: "The Legislature probably could not have been induced to adopt such provisions as these acts contain, at least in the sense which is claimed for them, for all parts of the commonwealth; for if the construction contended for be sound, they would draw within the maw of a court of equity all questions of disputed boundaries, including interfering surveys and settlements, which have been heretofore chiefly and satisfactorily committed to the determination of courts of common law, with the necessarily accompanying right of trial by jury. Even in England the very limited jurisdiction exercised by the Court of Chancery upon the subject of boundaries has been justly regarded with great disfavor and jealousy. In a leading case, Lord Keeper Henley, afterward Lord Chancellor and Earl of Northington, used this very emphatic language: 'There have, since I sat here, been several (bills) to fix boundaries, where a right to the freehold of the soil has been incidental. But I have seen such frightful consequences arising from them, that I think these suits are very far from deserving encouragement. They originally came into this court under the equity of preventing multiplicity of suits; yet in those cases I have observed that they have been sometimes attended with more expense than if all the suits which they had apprehended, and which they were brought to prevent, had actually been tried at law' (*Wake v. Congers*, 1 *Eden.*, 331; 2 *Cox*, 360). It was established as a principle in that case, which has been maintained and followed ever since, that the court has no jurisdiction to fix the boundaries of legal estates, unless some equity is superinduced by the act of the parties (2 *Leading Cases in Equity*, 318). It is maintained, however, by the learned counsel for the appellants, that the acts of 1858 and 1859 carry the jurisdiction

exercised by the Court of Chancery in England on the subject of disputed boundaries, and it is frankly conceded that there a mere dispute as to the dividing line of two adjoining estates, not held under the same title, where there is no especial equity affecting the defendant, would not give jurisdiction. Unless these acts are to have this construction, the appellants have no ground to stand upon. No special equity to affect the defendants is alleged or pretended. It was a very grave constitutional question, though it must now be regarded as solemnly settled by this court, whether the Legislature can constitutionally transfer any part of the common-law jurisdiction heretofore enjoyed and exercised by courts and juries to a court of chancery." The learned judge then examined the constitutional question at considerable length, and presented some strong arguments adverse to the constitutionality of the acts in question, but finally said: "We do not hold these acts to be unconstitutional. It is not necessary to do so. We are bound to give them such a construction as will not conflict with the Constitution; and that must necessarily be that they are confined in their true intendment to cases which are properly the subject of equitable jurisdiction. That jurisdiction must first be shown to exist, before the remedial provisions of the act can apply." It was then shown that the case did not come within the ordinary jurisdiction of a court of chancery, when the learned judge concluded: "We must leave these parties, therefore, to their legal remedies, for they have none but legal rights, however convenient the appellants may think it to have a commission out of chancery, at joint expense, to decide the question in dispute as to the course of the lines, to run them by actual survey, and to make partition of the undivided lands between the parties. A court of equity, as has been said, may do great things, but not all things" (*Norris's Appeal*, 64 Penn. R., 275, 279, 280, 282, 283).

Most of the American States have made provision by statute for the settlement of disputes concerning town lines. Some of these have already been referred to. In the State of New York it is provided by statute that "whenever a dispute shall arise between the officers of two or more towns respecting the bounds of either of such towns, on the same being represented to the Surveyor-General, he shall hear the allegations and proofs of the parties, and, if necessary, shall direct a survey to be made, and shall

determine such dispute. Such determination shall be filed in the office of the Secretary of State, and shall be conclusive upon the subject until the Legislature shall, by law, otherwise direct" (1 *R. S.*, 182, §§ 5, 6; 1 *Stat. at Large*, 182, 183). There seems to be no provision by statute in respect to determining a disputed boundary between adjoining lands held by different owners. It will not be necessary to refer to the statutes of other States providing for the settlement of the boundaries of the towns thereof, for the reason that such questions seldom arise, and, where they do arise, the statutes may readily be consulted.

Disputes in respect to boundary lines between adjoining owners of lands are settled, in a majority of cases, in the action of ejectment or the action for the recovery of real property; and not unfrequently the action for trespasses upon lands turns exclusively upon the question of boundary. These cases are not prosecuted with the *ostensible* object of determining the true boundaries between the parties; but probably a majority of the cases of ejectment are brought to recover lands claimed by the defendant to be embraced within his own boundary line, in opposition to the line claimed by the plaintiff; and, ordinarily, the question may be fully litigated and settled in such an action. It has been said to be sure that a court of law can give no adequate relief in cases of boundary. It was declared in the decision of a case in the English Court of Exchequer, many years ago, that a court of law "has no power to grant a commission to set out boundaries; it has no power to establish old boundaries, to direct intermingled lands to be separated, or an equivalent set out, and old inclosures to be restored; it can only direct possession to be given after the land in dispute is recovered in an action of ejectment" (*Attorney-General v. St. Aubin, Wightwick's R.*, 229). All this is true; and it is also true, as stated in an earlier case in the same court, that an *ejectment* does not ascertain by metes and bounds; and, therefore, if a plaintiff succeed in an action of ejectment, brought to recover possession of freeholds which have been mixed with copyholds, he will not be allowed to take execution on any part of the property he pleases (*Hardcastle v. Shafter*, 1 *Anstruther's R.*, 184). This is all true; but the action determines the right to the possession of the premises in question, and the verdict and judgment in the case, if in favor of the plaintiff, must describe the premises with such certainty as that the possession can be rendered. It is

obvious, therefore, that the question of boundary may be properly adjudicated in the action. So, also, actions of trespass are frequently brought to recover for damage alleged to have been sustained by reason of an adjacent owner of land cutting timber, and the like, over what is claimed to be the divisional line. In these cases, if the defendant pleads title, the question of boundary between the parties is effectually litigated and settled by the judgment.

It may be as well to observe, in this connection, that agreements made in respect to disputed boundary lines are not within the statute of frauds, because they cannot be considered as extending to the title; nor do they have the operation of a conveyance, so as to pass the title from one to another. The object is not to pass the estate, or to make a conveyance and transfer to one person of lands which belong to another; but such agreements proceed upon the fact that the true line of separation is not only fairly and truly in dispute, but that it is also, to some extent, undefined and unknown. They recognize and confirm the title of both the contracting parties to the land, of which they are respectively the real owners, and seek only to distinguish and place beyond the reach of future doubt the true line of separation between them. "To bring an agreement in respect to lands within the operation of the statute of frauds, it must, in effect, create, grant, assign, surrender or declare some interest or estate in lands, other than a lease for the term of one year; and whenever it is designed to have this effect it must be in writing, and subscribed by the party granting or creating such estate or interest, or it is absolutely void. It has been repeatedly held that a parol agreement to ascertain and establish a boundary line between the owners of adjoining lands, which is in dispute, and in some degree unknown and undefined, either directly by the parties themselves or through the medium of a submission to the award of others, is not an agreement which extends to the title, and therefore not within the provisions of the statute of frauds" (*Davis v. Townsend*, 10 Barb. R., 333, 346; and *vide Sellick v. Adams*, 15 Johns. R., 197; *Jackson v. Eager*, 5 Cow. R., 383; *Robertson v. McNeil*, 12 Wend. R., 578, 583). As was well said by a learned judge, who delivered the opinion in a late case decided by the Court of Appeals of the State of New York, "it is the policy of the law to allow parties to settle and adjust doubtful and disputed facts between themselves; and where such matter, which before was

uncertain, has been established by agreement between the parties, upon good consideration passing between them, they are not permitted afterward to deny it" (*Vosburgh v. Teator*, 32 *N. Y. R.*, 561, 567).

The same doctrine has been recently laid down by the Court of Appeals of the State of Kentucky, in a case wherein it was held that an oral agreement fixing a dividing line between adjoining lands of antagonist parties, not being within the statute of frauds and perjuries, may be enforced in equity (*Jamison v. Petit*, 6 *Bush's R.*, 669). And the Supreme Court of Michigan has quite recently held to a similar doctrine, declaring that a parol agreement, *long acquiesced in*, to settle a boundary between adjoining proprietors, being the result of an honest attempt to fix the true boundary, and according to which they have actually occupied, will be held good in an action at law, although the time has not been sufficient to establish an adverse possession. It appeared in the case that it was a question of doubt and uncertainty where the boundary was; and on that ground the court held that it was competent and lawful for the parties in interest to locate the boundary line; and having done so, and acquiesced therein for more than nineteen years, that the same was binding upon them and their grantees (*Smith v. Hamilton*, 20 *Mich. R.*, 433; *S. C.*, 4 *Am. R.*, 398).

The Supreme Court of the State of New York has recently decided that, under certain circumstances, the parties would be bound by a parol agreement fixing and settling a disputed boundary line, upon the principle of equitable estoppel, as where, upon the strength of such agreement, valuable and expensive improvements have been made by one, with the knowledge of the other party to the arrangement (*Corkhill v. Landers*, 44 *Barb. R.*, 218). And the Supreme Courts of Pennsylvania and Missouri have recently decided the broad ground, that a parol agreement between adjoining owners of land as to boundary is not within the statute of frauds, requiring agreements in relation to real estate to be in writing (*Vide Kellum v. Smith*, 65 *Penn. R.*, 86; *Kincaid v. Dormey*, 47 *Mo. R.*, 337).

And in an early case, decided by the English Court of Chancery, Lord Hardwicke said that a settlement of boundaries was not an alienation; because, if fairly made, without collusion, the boundaries so settled are presumed to be the true ancient limits (*Penn*

v. *Lord Baltimore*, 1 *Vesey, Sen., R.*, 444, 446). But unless the boundary line between the parties be in good faith in dispute and doubt, a parol agreement will not of itself affect the true title to the premises; as it would be wholly inoperative and void under the statute of frauds (*Terry v. Chandler*, 16 *N. Y. R.*, 354).

CHAPTER XXI.

REMEDIES AND PROCEEDINGS TO DETERMINE UNSETTLED BOUNDARIES IN A COURT OF EQUITY — JURISDICTION IN SUCH CASES — CASES IN WHICH JURISDICTION HAS BEEN ENTERTAINED.

NOTWITHSTANDING most cases of disputed boundary between the lands of adjacent owners are disposed of in a court of law, or by proceedings provided by statute, there are cases in which no adequate remedy is provided except in a court of equity. Where such cases exist, the aid of a court of equity may always be invoked. The origin of the jurisdiction of the Court of Chancery, however, in cases of boundary, is involved in much obscurity. The probable origin of it is thus stated by Sir William Grant, in an early case before the High Court of Chancery of England: "There are two writs in the register concerning the adjustment of controverted boundaries, from one of which it is probable that the exercise of the jurisdiction of the Court of Chancery took its commencement. The first is the writ *de rationabilibus divisis*; the other, the writ *de perambulatione faciendâ*.* Both Lord

* The writ *de rationabilibus* was in its nature a writ of right, formerly known in the English practice, but now abolished by act of Parliament, and lay properly where two men had lands in divers towns or hamlets, so that the one was seised of the land in the one town or hamlet, and the other of the land in the other town or hamlet by himself, and they did not know the bounds of the towns or hamlets, which was the land of one and which was the land of the other. Then to set the bounds in certain, this writ lay for the one against the other.

The writ *de perambulatione faciendâ* was another writ under the same practice, now also abolished by act of Parliament, and lay where parties were in doubt of the bounds of their lordships or of their towns; in which case they by assent might have sued out this writ, directed unto the sheriff, to make the perambulation, and to set the boundaries and limits between them in certainty. Such commission was oftentimes granted to make perambulation of three or four counties, where there was any doubt about the bounds and limits thereof, and this perambulation made by assent bound all the parties and their heirs (*Vide Fitzherbert's Natura Brevium*, 128, 133).

Northington and Lord Thurlow, without referring to this writ or commission as the origin of the jurisdiction of the court, have yet expressed an opinion that consent was the ground on which it had been at first exercised. The next step would probably be to grant the commission on the application of one party who showed an equitable ground for obtaining it, such as that a tenant or copyholder had destroyed or not preserved the boundaries between his own property and that of his lessor or lord, and to its exercise on such an equitable ground no objection has ever been made" (*Speer v. Cawter*, 2 *Merivale's R.*, 410).

Mr. Justice Story, in referring to these remarks of Sir William Grant, says: "This account of the origin of the chancery jurisdiction seems highly probable in itself; but, however satisfactory it may seem, it can scarcely be said to afford more than a reasonable conjecture, and is not a conclusive proof that such was the actual origin. In truth, the recent discoveries made of the actual exercise of chancery jurisdiction in early times, as disclosed in the Report of the Parliamentary Commissioners, already referred to in a former part of these Commentaries, are sufficient to teach us to rely with a subdued confidence upon all such conjectural sources of jurisdiction. It is very certain that, in some cases, the Court of Chancery has granted commissions, or directed issues, on no other apparent ground than that the boundaries of manors were in controversy (See *Letherlier v. Castlemain*, 1 *Dick. R.*, 46; *S. C.*, 2 *Eq. Abridg.*, 161; *Sel. Cas. Ch.*, 60; *Metcalf v. Beckwith*, 2 *P. Will.*, 376). And Lord Northington seems to have assigned a different origin to the jurisdiction from that already suggested upon one important occasion, at least, namely, that parties originally came into the court for relief, in cases of confusion of boundaries, under the equity of preventing multiplicity of suits" (1 *Story's Eq. Jur.*, § 613).

Notwithstanding the abolition of the two writs before mentioned by the English Parliament, the Court of Chancery, or a court of equity, has jurisdiction, both in England and in this country, in certain cases of disputed or lost boundaries; especially when the ordinary remedy at law is insufficient to accomplish the object of settling the matter between the parties. Where the parties have a complete remedy at law, of course there is no occasion for the interference of a court of equity, and such court will not take jurisdiction to settle the boundaries of land, unless

some equity is superinduced by act of the parties. An early case in the High Court of Chancery of England contains some very important rules, which guide the courts in cases of disputed boundary, and the same may very properly be referred to.

The defendants were the proprietors of the manor of Epping, and also of the freehold of certain lands adjoining to it, lying in the manor of Waltham; the boundary line of the two manors passed through the defendant's park. The bill alleged that the defendants had cut down and destroyed the boundary marks between the said manors, and prayed for a commission to set out and fix the boundaries between them. Lord Keeper Henley said: "I was desirous that some precedent should be produced to show me that this court could entertain a bill of this nature, to settle the boundaries of an incorporeal inheritance, but none such has been produced. All the cases where the courts have entertained bills for establishing boundaries have been where soil itself was in question, or where there might have been a multiplicity of suits. The court has, in my opinion, no power to fix the boundaries of legal estates, unless some equity is superinduced by the act of the parties, as some particular of fraud or confusion, where one party has ploughed too near the other or the like; nor has the court a power to issue commissions as of course, as here prayed" (*Wake v. Conyers*, 1 *Eden's R.*, 331; *S. C.*, 2 *Cox' R.*, 360). The bill in this case was filed for relief in a case of boundaries of incorporeal hereditaments, and the court held a commission would not be issued in such a case, and therefore the bill was dismissed; but the Lord Keeper suggested very clearly the cases in which the court would entertain a bill for establishing boundaries, where the soil itself was in question.

In a much later case before the same court, hereinbefore referred to, Sir William Grant observed: "On what principle can a court of equity interfere between two independent proprietors, and force one of them to have his rights tried and determined in any other than the ordinary legal mode in which questions of property are to be decided. In some cases, certainly, the court has granted commissions or directed issues on no other apparent ground than that the boundaries of manors were in controversy. In *Wake v. Conyers*, however, Lord Northington held that it was in the case of manors that the exercise of the jurisdiction, which (he says) 'had been agreed of late,' was peculiarly objectionable. He

refused either to grant a commission or to direct an issue. So did Lord Thurlow in the case of two parishes (*St. Luke's v. St. Leonard's*, 2 *Anstr.*, 395). In the same case of *Wake v. Conyers*, Lord Northington says that in his apprehension this court has simply no jurisdiction to settle the boundaries even of land, unless some equity is superinduced by act of the parties. I concur in that opinion, and think that the circumstance of a confusion of boundaries furnishes, *per se*, no ground for the interposition of the court. * * * If the ancient boundaries of the two manors be really unknown, how are commissioners to ascertain them, or what is to be done if they cannot be ascertained? Where it is through the default of a tenant or copyholder that boundaries are confused, the court provides, for the case of its being impossible to ascertain them, by directing so much of the defendant's own land to be set out as shall be equal to the quantity originally granted or leased. But because the owner of a manor can no longer find all the wastes that may once have belonged to it, he is not to have the deficiency made good out of his neighbor's estate" (*Speer v. Crawler*, 2 *Meriv. R.*, 410).

The cases alluded to in the judgment in the case of *Speer v. Crawler*, in which the court had taken upon itself to issue a commission or direct an issue for the purpose of settling boundaries, upon no other apparent ground than that the boundaries were confused, without any equitable circumstances being shown, were several in number, but the following only are referred to as examples: *Norris v. Le Neve*, *Robinson v. Hodgson*, *Clifton v. Gwynne* (cited in *Godfrey v. Littell*, *Tamlyn*, 230, 234); and *vide Hunt v. White*, *Seton's Records in Equity*, 95. In one of the cases cited by Mr. Justice Story in the extract quoted from his work on Equity Jurisprudence, the bill was brought to settle the boundaries of the manor of D. and the manor of S., of which the plaintiff and defendant respectively were lords. The court ordered that the parties should give a note to each other of their boundaries, and that the matter should be tried in a feigned issue (*Metcalfe v. Beckwith*, 2 *P. Will. R.*, 376). And it appears, from an authority cited in Mr. Hunt's little work on boundaries and fences, that in Ireland a different rule prevails from that adopted in England with respect to showing equitable circumstances to justify the interference of the court. There it has been held that mere confusion of boundaries is, *per se*, sufficient to warrant the interference

of a court of equity in the case, and the issuing of a commission (1 *Furlong's Landlord and Tenant*, 706; but *vide O'Hara v. Strange*, 11 *Irish Eq. R.*, 262; and *Fitzgerald v. Lord Norbury*, cited in 1 *Jones*, 557).

A number of cases are cited by Mr. Hunt, in the work mentioned, to illustrate the principles upon which commissions to settle boundaries are issued at the present day by the Court of Equity in England, where equitable circumstances are shown calling for its interference, some of which will be referred to here. A case before the High Court of Chancery, 200 years ago, was where the suit was brought for the discovery of the metes and bounds of four acres of land belonging to the plaintiff, which was mixed with the defendant's land, by ploughing and other means, so that the plaintiff's and defendant's land could not be distinguished. The court granted a commission to set out the metes and bounds, and the yearly value thereof; and how long the defendant had held the same, for which he was to pay the plaintiff (*Boteler v. Spelman*, 1 *Finch's R.*, 96; and *vide Latherlier v. Castlemain*, 1 *Dicken's R.*, 46; *Select Chancery Cases*, 60).

A case before the same distinguished court, within the last thirty years, was where the bill stated a system of gradual encroachment on the part of the defendant, the filling up of a ditch, and obliteration of the boundaries; and, further, the necessity, if the court should not interfere, of bringing a great number of actions against different parties in order to fix the boundaries and establish the plaintiff's right. The court held that the bill disclosed sufficient ground for a commission to issue, although it appears that the case turned on another point (*The Marquis of Bute v. The Glamorganshire Canal Company*, 1 *Phillips' R.*, 681). And in a much earlier case, a lord of a manor filed a bill against more than thirty tenants of a manor, freeholders, copyholders and leaseholders, who owed rents to the lord, but had confused the boundaries of their several tenements, praying a commission to ascertain the boundaries. It was objected at the hearing that the suit was improper, as it brought before the court many parties having distinct interests; but it was answered that the lord claimed one general right, for the assertion of which it was necessary to ascertain the several tenants. The court took this latter view, and granted a decree accordingly (*Magdalen Col-*

lege v. Athill, Mitford's Equity Pleadings, 183; and *vide Whaley v. Dawson*, 2 Schoales' & Lefroy's R., 367, 370).

In respect to the relief in cases where the lands of a *cestui que trust* have been confused with those of the trustee, a case of this nature was before the High Court of Chancery, wherein it appeared that the defendant was in possession of lands, both freehold and copyhold, which were intermixed with others in his possession devised to a charity. The court granted a commission to distinguish and set out the charity lands from those of the defendant (*The Attorney-General v. Bowyn*, 5 *Vesey's R.*, 300). And it seems that copyholders and leaseholders are equally under an obligation to preserve the boundaries of the property of which they are tenants.* In respect to relief in copyhold estates, in one case before the High Court of Chancery, the plaintiff was lord of the manor of W. The defendant and his ancestors had been possessed for many years past of copyhold premises situate in the manor, some being confounded and some unconfounded copyholds; and he was also possessed of and entitled to freehold lands in the said manor. The boundaries between the different estates having become confused, a bill was filed for a commission to ascertain them. In rendering his decision, Lord Eldon said: "It is the duty of the tenant to keep the boundaries. The confusion of boundaries does not infer any negligence on the part of the lord, for the tenant is in possession of the land." And he directed a commission to issue to distinguish the copyhold lands in the manor from the freehold lands, and the unconfounded from the confounded copyholds, and to ascertain and set out the boundaries; and if they could not be distinguished to set out lands of the tenant of equal value (*The Duke of Leeds v. Earl of Strafford*, 4 *Vesey's R.*, 180). And in another case a bill was filed by a lord of a manor praying for a commission to ascertain boundaries of copyhold lands, which had been fraudulently intermixed with freeholds; and an issue was directed to try what copyhold lands

* In England it appears that a copyholder, who removes or confuses landmarks and boundaries, or who pulls down an ancient inclosure, or incloses where there were no fences before, incurs a forfeiture (1 *Watkinson Copyholders*, 405). And by late acts of Parliament, powers are given of settling disputed boundaries of manors and lands in cases arising under these acts (*Vide* 4 and 5 *Vict.*, chap. 35, § 21, and 15 and 16 *Vict.*, chap. 51, § 24). It has been held that conditions relating to the fencing of copyhold property are discharged by enfranchisement (*Brabant v. Wilson*, 6 *Best & Smith's R.*, 979).

were in the possession of the defendant. On appeal, however, this decree was reversed, and a commission was directed to inquire into what copyhold and freehold lands were in the possession of the respondents, with liberty for the appellant to inspect all necessary deeds, court rolls, writings and other necessary evidence (*Rous v. Barker*, 4 *Brown's P. C.*, 660; *vide Clayton v. Cookes*, 2 *Atkyns' R.*, 449; *Winth v. Carpenter*, *Finch's R.*, 462; *Davenport v. Bromley*, *Ib.*, 17; *Pickering v. Kimpton*, 5 *Car.*, 2; *Tot-hill's R.*, 101; *Lord Abergavenny v. Thomas*, *West's R.*, 649).

With reference to the liability of a leaseholder to preserve his boundaries, and, as a consequence, the jurisdiction of a court of equity in such cases, it was said by Lord Eldon, in a case before the High Court of Chancery, that it had long been settled that a tenant contracts, amongst other obligations resulting from the relation of landlord and tenant, an obligation to keep distinct from his own property during his tenancy, and to leave clearly distinct at the end of it his landlord's property, not in any way confounded with his own; and he observed: "There is, therefore, a common equity that a tenant, for his own convenience, in order to make the most of it during his tenancy, is bound, at the end of the term, to render up specifically the landlord's land; and if he cannot, that a commission shall issue from a court of equity to inquire what were the lands of the landlord, the court taking care, to the intent that the tenant may discharge his obligation, to do what is right as to the possession in the meantime; and if the tenant has so confounded the boundaries, by subdividing the land by hedges and stones, and destroying the metes and bounds, that the landlord's land cannot be ascertained, the court will inquire what was the value of the landlord's estate, valued fairly, but to the utmost as against the tenant, who has himself destroyed the possibility of the landlord having his own" (*The Attorney-General v. Fullerton*, 2 *Vesey & Beame's R.*, 263).

So in another case before the same court, the same distinguished judge said that it was a clearly-established duty on the part of a tenant to keep the boundaries of the demised property distinct, and that, if the tenant confused his landlord's property with his own, equity would aid the reversioner and give him as much land (*Aston v. Lord Exeter*, 6 *Vesey's R.*, 292). And in a still later case, Lord Eldon expressed himself to the same effect (*Griersond v. Eyre*, 9 *Vesey's R.*, 345; *vide Glynn v. Scowen*, *Finch's R.*,

239; *Willis v. Parkinson*, 2 *Meriv. R.*, 507; *Godfrey v. Littell*, 1 *R. & My. R.*, 59; *S. C.*, 2 *ib.*, 630). And it has quite recently been held in the High Court of Chancery, before Sir William Page Wood, vice-chancellor, that relief will be granted at the suit of the landlord, not only against the tenant himself, but also against all persons claiming under him, either as volunteers or as purchasers with notice; but it was declared that it must be shown that the tenant was in possession of the specific land originally demised (*Attorney-General v. Stephens*, 1 *Kay & Johnson's R.*, 724; *S. C.*, 6 *De Gex, Macnaughton and Gordon's R.*, 111; *S. C.*, 24 *L. J.*, *ch.* 694, and 25 *ib.*, 888). And the doctrine was laid down by Vice-Chancellor Wood, in the same case, that a tenant will not be relieved from liability, in respect of confusion of boundary, by the fact that the boundary was confused by some previous holder of the lands, between whom and himself there exists no privity of estate; for it is the tenant's duty to have the landlord's property at all times distinguishable from his own, when the landlord requires it (*Attorney-General v. Stephens*, *supra*; and *vide Attorney-General v. Fullerton*, 2 *Vesey & Beames R.*, 263). In like manner it was declared by Lord Eldon to the effect that "each of several co-lessees is under an obligation not only not to intermix lands, but not to suffer that intermixture by his co-lessees. They have an interest as the lessees of their landlord, and that interest is connected with a duty which rests upon them all, that each and every of them shall not bring into difficulty the title to the lands" (*Willis v. Parkinson*, 1 *Swanston's R.*, 9; *S. C.*, 2 *Meriv. R.*, 507). In all such cases between landlords and tenants, it seems the court will grant the landlord a commission instead of driving him to an ejectment, in which the tenant's possession gives him a manifest advantage (*Vide 1 Furlong's Landlord and Tenant*, 269).

These cases, which have been considered in the English courts, are most of them of an ancient date; but they are all recognized as authority in England at the present day, and the current practice in England is in accordance with the rules laid down in such cases. And it may be affirmed that a similar practice prevails in the American States. In November, 1872, the Supreme Court of the State of New York, at a Special Term, appointed a commission of freeholders of the county to find, ascertain, fix and establish the boundary lines of certain lands in dispute, by metes and

bounds, and to set corners and monuments to designate the corners and lines of the lands. The case before the court was this: Each party to the action was owner in fee of one-fourth part of over 1,200 acres of land, of an uneven and hilly surface, and mostly wild and covered with timber; and the boundary or division lines between the several owners had never been ascertained or fixed by any accurate survey, nor had corners been set, or monuments erected, or trees been marked to designate either of the corners or lines of the land of either party; neither party could, with the aid of a surveyor, ascertain with reasonable accuracy, except by chance, the boundary or division lines between his land and that of the other parties; and the boundary lines of no one of the parties could be determined and fixed without ascertaining the location of the boundary lines, or some of them, of each of the other parties. The court held that these boundary lines ought to be ascertained, fixed and designated, so that the parties would be bound by the locations thereof, and know where they were. The doctrine was laid down, that a confusion of boundaries of lands exists when, by the deeds thereof, or the acts of the owners or occupants, the boundaries cannot be ascertained with reasonable certainty by one party alone, or except by the judgment or opinions of men, after an examination of the deeds and the premises, with a surveyor, aided, perhaps, by the examination of witnesses. It was thought the case came within the rule, and justified the appointment of commissioners, and they were accordingly appointed, and the doctrine was declared, that an action in equity will lie, to ascertain and fix the boundary lines between the lands of the parties, whenever there are peculiar equities attaching themselves to the controversy, or where it will prevent a multiplicity of suits. (*Boyd v. Dowie*, 65 Barb. R., 237.)

In a late case before the Court of Chancery of the State of New Jersey, it was held that courts of equity have jurisdiction, in cases of confusion of boundaries, to establish lines; and although they never entertain a simple suit to fix boundaries between individuals where courts of law have jurisdiction, yet, where the question is connected with matters that require the interference of equity, as where a defendant has threatened, and has served a formal written notice, that he intends to remove ten inches of the end wall of the complainant's dwelling, which the defendant alleges is upon his land, a court of equity,

it was held, will, to prevent multiplicity of suits, entertain jurisdiction and settle the boundaries, in order to determine whether the complainant is entitled to the continuance of its protection by injunction (*De Veney v. Gallagher*, 20 *N. J. Eq. R.*, 33). This is a late and well considered case, and settles the principle substantially in accordance with the English authorities. Other American cases will be presently referred to in which the doctrine is recognized, although the cases themselves may have been held not to come within the jurisdiction of a court of equity. Of course, when a mistake has occurred in a conveyance in respect to the boundaries of the land intended to be described, a court of equity is the proper tribunal in which to correct the mistake. For example, in a case before the Supreme Court of New Hampshire, it appeared that a deed erroneously, and contrary to the intention of both parties, stated a boundary line as running north, twenty degrees east, instead of north, twenty degrees west. The court held that the error could be corrected in a suit against parties deraining title through the grantor, they all having taken notice of the error, but it would have to be done by a proceeding in equity. And it was held in the case, that one notified after he had contracted to buy the land, but before receiving the deed, would not be protected as a purchaser without notice (*Prescott v. Hawkins*, 16 *N. H. R.*, 122). And it has been recently held, by the Supreme Court of Texas, that where a suit is brought by one of two owners of contiguous land, to compel the other to permit him to run the dividing line, and it appears that the line had been run by former owners, the right to have a divisional line run and judicially established, if necessary, rests on the same principle as a right to an action for specific performance; and that, if the line had been run by former owners, and could be in part discovered, such action could not be maintained (*George v. Thomas*, 16 *Texas R.*, 74).

In a case decided by the Supreme Court of Connecticut, and referred to in the preceding chapter, it was said that the issuing of commissions to ascertain lost boundaries was a very ancient branch of equity jurisdiction; and that the statute of Connecticut, conferring equity jurisdiction, was quite broad enough to embrace it (*Perry v. Pratt*, 31 *Conn. R.*, 433). And in a somewhat recent case before the courts of North Carolina, where it appeared that a mill-race was conveyed, and afterward filled up and ploughed

over by one who had an interest in the land, the Supreme Court in equity took jurisdiction and granted relief, "under a well-settled head of equity jurisdiction — confusion of boundaries" (*Merriman v. Russell*, 2 *Jones Eq. R.*, 470). But in an early Virginia case it was declared that a court of equity would not entertain jurisdiction in a boundary case, unless it appeared that the plaintiff had some equity against the defendant claiming adversely to him (*Stuart v. Coulter*, 4 *Rand. R.*, 74; and *vide Dickerson v. Stoll*, 4 *Halst. Ch. R.*, 294).

Judge Willard, in his comprehensive work on Equity Jurisprudence, says: "The relief which equity affords, in the case of confusion of boundaries, is referable to the head of accident. When *lands* have become mixed or confounded without the fault of the plaintiff, equity will appoint a commission to settle the boundaries, and, upon confirming the report, make a proper decree between the parties" (*Willard's Eq. Jur.*, 56). The only authority which he cites is the decision of Lord Chancellor Hardwicke, made in 1744, in *Norris v. Le Neve*, 3 *Atk. R.*, 82, in which commissioners had been appointed to settle the boundaries between the parties, and for separating freehold and copyhold lands; and the question of jurisdiction was not referred to by the lord chancellor. It may be assumed, therefore, that it was a plain case of confusion of boundaries, in which the jurisdiction of the court was not questioned. But the doctrine of Judge Willard is sustained by numerous English authorities, and is not inconsistent with the case of *Boyd v. Dowie*.

From the cases examined it is very clear that, both in England and in this country, courts of equity will always take cognizance of controversies in respect to boundaries of land whenever the parties cannot obtain substantial relief in a court of law, or where equitable circumstances are shown, calling for the interference of a court of equity; although, as a rule, unless some statute exists upon the subject, the existence of a controverted boundary is not of itself alone a ground for relief in equity. Other circumstances must be shown which seem to require the interference of the court. Whenever such circumstances do exist, it may be observed that full and actual possession is sufficient title to maintain a suit for settling boundaries; a strict title is never entered into in cases of this kind. This was so declared by Lord Hardwicke many years ago, and the rule has not been changed (*Penn v. Lord Baltimore*, 1 *Vesey, Sen., R.*, 444).

It may also be stated here that a court of equity exercises jurisdiction in cases where distress for rent has become difficult or impossible by reason of confusion of boundaries, which is more common in England than in this country (*Vide Mitford's Eq. Pleadings*, 117). It was held at an early day in England that if a tenant of lands confounds the boundaries in order to prevent a distress, the lord will be entitled to a commission to ascertain them (*Bouverie v. Prentice*, 1 *Brown's C. C.*, 201). And in another case, where it appeared that, by great length of time, it had become impossible to know out of what particular lands ancient quit-rents were issuable, a court of equity has exercised a jurisdiction, and it was declared that such courts had constantly, on proof of payment within a reasonable time, decreed a satisfaction for all arrears of such rents and payment of the same for the future (*Duke of Bridgewater v. Edwards*, 6 *Brown's Parliamentary Cases*, 368). So, also, from an important case before the High Court of Chancery in the time of Lord Hardwicke, it appears that "where a man is entitled to rent out of lands, and through process of time the remedy at law is lost or become very difficult, the court of equity will interpose and give relief, upon the foundation only of payment of the rent for a long time; and that the court will even go so far as to give relief where the nature of the rent (as there are many kinds at law) is not known, so as to be set forth; but then all the terre-tenants of the lands out of which the rent issues must be brought before the court, in order for the court to make a complete decree" (*Benson v. Baldwin*, 1 *Athyn's R.*, 598). And it may be added that the fact of the boundaries of the land out of which the rent issues, or the days on which it is payable, or the nature of the rent, being uncertain, or other grounds of relief, must be clearly stated in the bill; or else a landlord might be very vexatious to a tenant, and make him spend in his own necessary defense more than three times the value of the rent (*Vide Holder v. Chambrey*, 3 *P. Wms. R.*, 256). And before relief can be given to the party entitled to the rent, it must be clearly shown that the tenant of the land out of which it issues is in possession of some part of the land chargeable with the rent (*Mayor of Basingstoke v. Bolton*, 1 *Drewry's R.*, 270; *S. C.*, 3 *ib.*, 50).

It may also be suggested here that it is a well-established rule in equity that the plaintiff is entitled to compel the discovery of

everything in the possession of the defendant, whether consisting of facts, deeds, papers or documents, which will help the plaintiff make out his own case; and that he can only be refused inspection of evidence which relates exclusively to the case of the defendant. The like discovery may also be compelled without the trouble of filing a cross-bill (*Vide Ingilby v. Shafto*, 33 *Beavan's R.*, 31, 42; *Bolton v. Corporation of Liverpool*, 3 *Sim. R.*, 467; *Llewellyn v. Bordeley*, 1 *Hare's R.*, 527; 2 *Daniell's Ch. Pr.*, 1659, *et seq.*, 4th ed.; *Wigram on Discovery*, 15). It has been accordingly held that, where a party is impeded in the recovery of his property at law merely by reason of his inability to identify it, in consequence of confusion of boundary or from any other cause, the court of equity will assist him by compelling a discovery of what are the farms or pieces of land, the names of the tenants, and the like (*Loker v. Rolle*, 3 *Vesey's R.*, 4, 7). And where the plaintiff prayed for discovery of certain documents (consisting of old surveys, deeds and the like), which the defendant admitted to have in his possession, in order to find out how the parcels and boundaries of property in litigation were delineated, he was allowed to see such portions of the documents as related to the said parcels and boundaries; but was denied inspection of those portions which did not relate to the subject-matter of the suit (*Jenkins v. Bushby*, 35 *L. J. Eq.*, 400). Where, however, the boundaries have been confused by the persons whose duty was to preserve them and keep them distinct, such as a copyholder or leaseholder, he will be obliged to produce any evidence he may have in his possession, which tends to remove the difficulties which he himself has created; but he will not be under this necessity, unless the boundaries cannot otherwise be proved (*Southwell v. Thompson*, 6 *L. J. Ch.*, *N. S.*, 196).

A purchaser of lands under the description of "partly freehold and partly leasehold" is entitled to have the boundary dividing the freehold from the leasehold defined by reference to the instruments of title, or shown to be capable of being so defined; but the circumstance that the property is described in the agreement as "partly freehold and partly leasehold," the boundaries distinguishing the one from the other not being stated, and having not hitherto been clearly defined, is not an objection to a decree for specific performance. The uncertainty in the boundary or extent of property, which arises not from an instrument being incapable

of legal construction, but from its not having heretofore received any such legal construction, is no ground for refusing specific performance of a contract to sell such property (*Monro v. Tayin*, 8 *Hare's R.*, 51; *S. C.*, 3 *Macnaughton & Gordon's R.*, 713; *S. C.*, 21 *L. J. Eq.*, *N. S.*, 525).

In the time of Lord Chancellor Hardwicke, the High Court of Chancery of England took jurisdiction of an agreement between the grantees of two provinces in America relating to the settlement of disputed boundary, founded on articles of agreement executed in England, under seal, for mutual consideration, and decreed that such agreement be specifically performed, although the crown only has jurisdiction in cases of this nature; for the Queen's courts, both of law and equity, provided the parties to be affected by the judgment or decree are within their jurisdiction, can take cognizance of and enforce an agreement, whatever may be the subject-matter of it (*Penn v. Lord Baltimore*, 1 *Vesey, Sen., R.*, 444, 447).

CHAPTER XXII.

REMEDIES AND PROCEEDINGS IN EQUITY TO DETERMINE UNSETTLED BOUNDARIES OF LAND — CERTAIN RULES HELD TO APPLY TO ALL CASES OF CONFUSION OF BOUNDARY — CASES IN WHICH EQUITY JURISDICTION HAS BEEN DENIED.

THE courts have settled certain rules which apply to all cases of confusion of boundary, whether occurring between independent proprietors or between a landlord and his tenants; for example, it was long ago decided by the courts of England that a commission should not issue to attain a remote consequential advantage. A bill was brought by a rector principally on account of tithes, and to have a commission to settle the boundaries of the parish and the glebe; Macdonald, C. B., said: "The plaintiff here calls upon the court to grant a commission to ascertain the boundaries of the parish, upon the presumption that all the land which is found within these boundaries will be titheable to him. That is indeed a *prima facie* inference, but by no means conclusive, and there is no instance of the court ever granting a commission in

order to attain a remote consequential advantage. It is a jurisdiction which the Courts of Equity have always been very cautious of exercising" (*Atkins v. Hatton*, 2 *Austr. R.*, 386).

Another rule applying to all cases of confusion of boundary is, that the Court of Equity will not grant relief unless it be shown that, without the assistance of the court, the boundaries cannot be found. That is to say, this is the rule unless, as in some cases, a different practice is established by the statutes of the State. This has been substantially shown by cases heretofore considered; and others may be cited to the same purpose. The doctrine was laid down in an important case in the High Court of Chancery of England during the time of Lord Chancellor Eldon; and the case contains such a full and lucid exposition of the rules which guide the courts in boundary questions that it may, with propriety, be cited at length. It appeared that A. was entitled to the fee simple in four acres of land, part of a field containing about five acres; the remaining one acre belonged to the crown, and was devised for a term of ninety-nine years to a tenant, whose interest A. purchased, and thus became entitled to the possession of the whole field. In 1805 the lease terminated, and the defendant purchased the share and interest of the crown in the said acre of land. A yearly tenant of A., under some misapprehension, then let the defendant into possession of the whole field; and he had since continued to hold, refusing to set out the portion of the field belonging to the plaintiff, upon whom A.'s interest had devolved, or to make any compensation. There was no evidence either that the defendant had obtained possession of the four acres improperly, or that A. or the plaintiff had ever acknowledged him as their tenant. The plaintiff thereupon filed his bill to obtain amongst other things a commission to ascertain boundaries, and a commission of partition.

Sir Thomas Plumer, master of the rolls, said: "In every bill for a commission to ascertain boundaries it is first necessary to show that, without the assistance of the court, the boundaries cannot be found. Now, here that is not proved; the answer admits that the whole field has been held together; the bill states that there are no marks and bounds to distinguish one part from the other; and though there may be none that are visible and apparent to the eye, yet it does not follow that, by addressing themselves to old people acquainted with the place, or by examin

ing the tenant, they might not separate the two parts. The court would expect this to be clearly established before it would interfere. But if the difficulty of finding the boundaries were established, it is clear the plaintiff does not stand in a predicament that gives him a right to apply for a commission. This is a case of persons claiming by adverse title; there is no connection between them, to serve as a foundation for the court to proceed on in ordering a commission. This subject is very luminously considered by the late master of the rolls, in *Speer v. Cawter*; and that case has settled that you must lay a foundation for this species of relief not merely by showing that the boundaries are confused, but that the confusion has arisen from some misconduct on the part of the defendant, or those under whom he claims, of which you have a right to complain, and which renders it incumbent on him to co-operate in re-establishing them. But the court will not interfere between independent proprietors, and confusion of boundaries, *per se*, is no ground to support such a bill. Here the crown and the plaintiff claim independently of each other, and nothing is stated in the bill but the mere fact of the boundaries being confused. The case stated by the plaintiff is, therefore, obviously open to this fatal objection. * * * The remainder of the prayer is for a commission in the nature of a writ of partition; but this proceeds from a mistaken view of the subject. Partition can only be between joint tenants, tenants in common or coparceners; originally it was confined to coparceners, who derived that name from being able to compel partition (1 *Inst.*, 241). By the statute 31 Henry VIII it is extended to tenants in common and joint tenants, but the principle is the unity and entirety of possession, that each party has an undivided interest in and a right over the whole, and hence the plea of *non tenet insimul* is a good plea to a writ of partition, and hence also it is necessary for them to make conveyances to each other, after their portions are set out. The same rules that prevail at law are adopted in equity, and it is only on the same grounds that you can apply to this court. * * * Here the plaintiff and the crown claim by distinct and adverse titles, as independent owners, and there can be no partition between them. Partition is not given for any such reason as confusion of boundaries, but from the nature of the interest of the parties. This part of the bill is

quite as untenable as the rest" (*Miller v. Warrington*, 1 *Jacob & Walker's R.*, 484).

Still, another rule is that, in order to obtain relief from a court of equity in cases of boundary, it is necessary for the plaintiff to establish a clear title to some land in the possession of the defendant. In support of this proposition a leading case may be referred to, decided by the High Court of Chancery of England, where a bill was brought to ascertain and set out the boundaries of lands belonging to the plaintiff, under whom the defendant had held as lessee for a number of years, on the ground that the defendant had, during the lease, confused his own lands with those of the plaintiff, so that they could not be distinguished. It was satisfactorily proved that part of the land in the possession of the defendant belonged to the plaintiff. The master of the rolls, Sir John Leach, said: "It appears, by the authorities which have been referred to, that, to sustain a bill of this nature, it is necessary that the plaintiff establish a clear title to some land in the possession of the defendant; and, according to the case in *Bunbury*, the court will not direct an issue to try the title if it be left in doubt upon the evidence in the cause. It has been argued that the title of the plaintiff must appear by the admissions of the defendant, and that it is not enough that it be established to the satisfaction of the court by the evidence in the cause. That proposition is not countenanced either by authority or by principle, and is manifestly untenable; for, if such were the rule, there never could be a decree for the plaintiff in a suit of this nature, as no defendant would admit the plaintiff's title. When the court is satisfied with the plaintiff's title, and that he has an equitable ground for the assistance of this court, the authorities will justify the court in affording relief, either by a commission or by an issue, as will best advance the justice of the particular case" (*Godfrey v. Littell*, 1 *Russell & Mylne's R.*, 59; *S. C.*, 2 *R. & My. R.*, 639; and *vide Chapman v. Spencer*, 1 *Eq. Ca. Abrid.*, 163, A. 21; *Lord Teynham v. Herbert*, 1 *Atk. R.*, 483; *Mayor of York v. Pilkington*, *Ib.*, 282; *S. C.*, 2 *ib.*, 302; *Sayer v. Pierce*, 1 *Ves. R.*, 232). And in another late case in England, before Vice-Chancellor Wood, the crown sought to recover land alleged to have been reclaimed from the sea by encroachment or purpresture; the vice-chancellor said that he apprehended that if the defendant admitted the crown's title to the soil between the then present high and low-

water mark (which, however, was disputed), then, upon inquiry as to the boundary of the sea-shore, the *onus* would be thrown upon the crown of showing that the high-water mark in former times extended further inland than at present (*The Attorney-General v. Chamberlaine*, 4 *Kay & Johns. R.*, 292; *vide Attorney-General v. Chambers*, 4 *De Gee & Jones' R.*, 55).

It seems that a court of equity will not refuse relief to a person whose land has been improperly sold in consequence of confusion of boundary, although such confusion may have arisen from the neglect of the party seeking relief, or those through whom he claims. Thus, in a late case before Vice-Chancellor Wood, it appeared that a testatrix, by her will, appointed the manor of W. (over which she had a power of appointment) to uses, under which the plaintiff became entitled as tenant in tail in possession; and she devised her residuary real estate to trustees upon trust to sell. The trustees sold, *inter alia*, a field, part of which was shown by the abstract to be parcel of the manor; and they procured the legal estate in the whole property sold to be conveyed to a purchaser who took with full notice of the limitations under which the plaintiff became entitled. It was held that, notwithstanding the error of the trustees arose from the boundaries of the property having been confused by the person through whom the plaintiff claimed, the plaintiff was not precluded from establishing in equity a claim to his share of the land, and to a proportional part of the rents from the time he became tenant in tail in possession; and an inquiry was directed in what part of the field the plaintiff's portion was situated (*Hicks v. Hastings*, 3 *Kay & Johns. R.*, 701; *and vide Clarke v. Yonge*, 5 *Beavan's R.*, 523).

And perhaps it may here be repeated that Lord Hardwicke has held and declared that full and actual possession is sufficient title to maintain a suit for settling boundaries; that a strict title is never entered into in cases of this kind (*Penn v. Lord Baltimore*, 1 *Vesey, Sen., R.*, 444). And, further, it seems that the retainer by the court for a year of a bill praying for relief on the ground of confusion of boundaries, and the consequent impossibility of distraining for a rent-charge, is not in itself a determination that relief in equity must ultimately be given; nor will the admission by the defendant of the plaintiff's right give the court of equity jurisdiction in a matter not properly within its cognizance (*Vide Harwood v. Oglander*, 6 *Ves. R.*, 225; *Geast v. Barker*, 2 *Bro.*

C. C., 61; *Curtis v. Curtis, Ib.*, 620, 628; *Duke of Leeds v. Corporation of New Radnor, Ib.*, 338).

Mr. Justice Story, in treating upon this subject in his valuable Commentaries on Equity Jurisprudence, observes: "Where there is an ordinary legal remedy, there is certainly no ground for the interference of courts of equity, unless some peculiar equity supervenes which a court of common law cannot take notice of or protect." The learned author then refers to several English cases, which have been hereinbefore cited, and continues: "These cases are sufficient to show that the existence of a controverted boundary by no means constitutes a sufficient ground for the interposition of courts of equity to ascertain and fix that boundary. Between independent proprietors such cases would be left to the proper redress at law. It is, therefore, necessary, to maintain such a bill (as has been already stated), that some peculiar equity should be superinduced. In other words, there must be some equitable ground attaching itself to the controversy." What will constitute such a ground is then briefly discussed, when the learned author proceeds to say: "In the next place, it will be a sufficient ground for the exercise of jurisdiction that there is a relation between the parties which makes it the duty of one of them to preserve and protect the boundaries, and that by his negligence or misconduct the confusion of boundaries has arisen. * * * In the next place, a bill in equity will lie to ascertain and fix boundaries when it will prevent a multiplicity of suits. This is an old head of equity jurisdiction; and it has been very properly applied to cases of boundaries. * * * And it will not constitute any objection to a bill, to settle the boundaries between two estates, that they are situate in a foreign country, if, in other respects, the bill is, from its nature, properly maintainable" (1 *Story's Eq. Jurisprudence*, §§ 616-621).

The doctrine will be further illustrated by a reference to a few leading cases in which a court of equity has refused to interfere. In an early case, before the High Court of Chancery of England, Lord Thurlow refused to issue a commission to ascertain the boundaries of two parishes, with a view to settling disputed questions as to poor-rates belonging to each parish, saying: "That if he should entertain a bill and direct an issue in such a case, he did not see what case would be peculiar to courts of law. * * * Where there was a common right to be tried such a proceeding

was to be understood. The boundary between the two jurisdictions was apparent. That was the case where the tenants of a manor claim a right of common by custom, because the right of all the tenants of a manor is tried by trying the right of one; but in the case before him he saw no common right which the parishioners had in the boundaries of the parish. It would be to try the boundaries of all the parishes in the kingdom on account of the poor-lands." The doctrine of the case seems to be that a court of equity will not take jurisdiction of controversies in respect to boundaries simply to prevent a multiplicity of suits, except where only one general right is claimed by the bill against a number of defendants who have separate and distinct interests, of such a nature that trying the right of one defendant is trying the right of all (*St. Luke's v. St. Leonard's*, 2 *Austr. R.*, 95; and *vide Phillips v. Hudson*, 2 *L. R. Ch. App.*, 243). And in a later case, before Lord Chancellor Loughborough, the bill of the plaintiff charged that the boundaries of the land in question were so intermixed and blended that no ejectment could be brought, and prayed the court to ascertain the lands, and declare which belonged to the plaintiff and which to the defendants. The bill was demurred to by the defendants, and it was insisted that, from the plaintiff's own statements, there was nothing to prevent him from bringing an ejectment if he was entitled to any relief, and was not barred by length of time. The lord chancellor allowed the demurrer, saying: "Upon the face of the bill it is quite clear the plaintiff may draw a declaration in ejectment. The bill states the title, and that by some means or other the same persons are in possession of all the lands, and have confounded the boundaries. The only consequence is, that the plaintiff may come for a discovery to know what are the farms, and who are in possession; but that never can entitle him to come for possession and an account. He avers, contrary to the fact disclosed by his bill, that he does not know the lands. He describes the two farms and the tenement. If he had filed a bill for discovery only, he must have paid for the discovery; but it goes on to pray relief, that is merely an ejectment. As to the form of the demurrer, I take it now to be a settled point that, though he may be entitled to a discovery, yet if he goes on to pray relief to which he is not entitled, it is a good ground of demurrer, and the defendant is not to be put to answer. He may bring an ejectment for a farm,

the name of which he knows, and a tenement, which he describes by the name of the last occupier" (*Loker v. Rolle*, 3 *Vesey's R.*, 4, 7).

Reference may also be made to a couple of leading American cases in which courts of equity have refused to take cognizance of disputed boundaries. Prior to the present statute of Connecticut upon the subject, proceedings were instituted in a case in equity for the purpose of settling a disputed boundary between two adjoining proprietors, and the court refused to interfere. The petition alleged in substance that the defendant was in possession of a strip of land, adjoining the land of the plaintiff, which really belonged to him, and the court was asked to determine in whom the strip of land was vested. The court was unable to see that there was any matter charged in the petition which could not be made available in a court of law, and it was therefore decided that the bill could not be sustained. Hinman, J., delivered the opinion of the court, and said: "We have not been able to discover any ground in this case upon which the plaintiff's bill can be sustained. It cannot be supported on the ground of quieting them, or either of them, in the possession of property to which they have an equitable but not a legal title. In respect to the land in controversy, it is admitted and claimed that the title to it is a perfect legal title in one of the plaintiffs. * * * Upon the facts stated in the bill we can discover no other plausible ground for the interference of a court of equity. The only other object to which these facts seem to have any application is the settlement of a disputed boundary between the land of Elisha Walcott and the land of the defendant. * * * The plaintiffs do not claim that a mere controversy in respect to boundaries is sufficient to transfer, to a court of equity, jurisdiction over the proper subject-matter of an action at law which depends upon it" (*Walcott v. Robbins*, 26 *Conn. R.*, 236, 239, 241).

In a late case before the Supreme Court of California, it was decided that the bare existence of a controverted boundary is not sufficient ground for relief, in equity, by an action to settle disputed boundaries between adjoining landowners; that before courts of equity will interfere in such cases some peculiar circumstances must exist, of such a nature that an action of ejectment will not afford relief. The pleadings in the case before the court showed it to be a case where relief could be obtained in a

court of law, and therefore the court below dismissed the bill, and the Supreme Court affirmed the judgment.

Sanderson, J., delivered the opinion of the court, and said: "This action purports to be what would have been, prior to the adoption of our code of procedure in civil cases, a bill in equity to ascertain and settle disputed boundaries between adjoining land-owners. * * * It may be conceded that, under the head of concurrent jurisdiction, courts of equity may entertain cases of this character; but it is certain that of late they have confined their jurisdiction in respect to such cases within very narrow limits. It can rarely happen that the action of ejectment will not afford adequate relief in such cases; and wherever such appears to be the case, courts of equity will decline to interfere, upon the familiar principle that where there is an adequate legal remedy there is no ground for relief in equity. * * * The existence of a controverted boundary by no means constitutes sufficient ground for relief in equity; in all such cases the remedies at law are adequate. Before courts of equity will interfere, some equitable ground must attach itself to the controversy—such as fraud, or some relation between the parties which makes it the duty of one of them to protect and preserve the boundaries; or that the question affects a large number of persons, and the boundaries have become confused by lapse of time, accident or mistake" (*Wetherbee v. Dunn*, 36 Cal. R., 249, 255).

In respect to the practice in cases of boundary in courts of equity, little need be said, for those cases are governed in the main by the same principles by which others are governed. And yet there are some rules of practice which are peculiar to those cases. In granting relief in cases of confusion of boundaries, a court of equity may either direct a commission to issue for the purpose of ascertaining them, or it may direct a trial of the question before the court itself, with or without a jury, or before a court of common law. Perhaps the rule laid down by Lord Brougham, when Lord Chancellor of England, is as nearly to the point as any which can be suggested. He observes: "Where the question is one involving a mere positive affirmation on the one hand, or a negative on the other, an issue is the fitter and more convenient course. But where the object of the inquiry is to ascertain how much of the land has been retained by the defendant, and in what direction, and, if the part retained cannot be

exactly ascertained, to determine whether any and what compensation should be made to the plaintiff, the investigation is much more easily and properly conducted by a commission, composed partly of learned persons and partly of surveyors perambulating upon the spot, than before a jury, amidst the hurry and inaccuracy necessarily incident to a trial at Nisi Prius" (*Godfrey v. Littel*, 2 *Russell & Mylne's R.*, 630). In a much later case before Vice-Chancellor Wood, involving similar principles, the crown sought to recover land alleged to have been reclaimed from the sea by encroachment or purpresture. The defendant disputed the crown's title to the soil between the then present high and low-water mark. The court directed issues to try that right, before inquiring how far in former times the ancient high-water mark extended inland; notwithstanding the hardship it might impose upon the defendant, who, by admitting the soil upon which he had exercised acts of ownership to be part of the foreshore, would, in effect, have proved the case of the crown, in the event of his failing to satisfy a jury that a grant must be presumed (*The Attorney-General v. Chamberlaine*, 4 *Kay & Johns. R.*, 292).

It has been very properly remarked that partition is not given for any such reason as confusion of boundaries; and yet, from the nature of the interest of the parties, a commission to settle boundaries partakes very much of the nature of a commission of partition, and it is nearly in the same form, and issued out, executed and returned in the same manner. It may, therefore, suffice to refer to any approved work on chancery practice for an account of the proceedings of a court of equity under a decree for partition. The method of nominating the commissioners and suing out the commission, the powers of the commissioners in examining witnesses and enforcing the production of deeds, and the like, and many other points of practice which occur both in commissions to settle boundaries and in commissions for partition, will be found detailed in the works on chancery practice, and particularly in Mr. Daniell's distinguished treatise upon that subject.

In form, the decree in these cases directs a commission to issue, directed to certain commissioners therein named, to distinguish the lands of the plaintiff from those of the defendant, and to set out the same by metes and bounds. It directs all deeds and writings relating to either estate, in the custody or power of any of the parties, to be produced before the commissioners upon oath,

as they shall require; and declares that the commissioners shall be at liberty to examine witnesses upon oath, take their depositions in writing, and return the same with the commission. It then directs that, after the lands shall be so set out, the defendant shall deliver possession thereof to the plaintiff, and that the plaintiff and his heirs shall hold and enjoy the same against the defendant or any person or persons claiming under him. An account and apportionment of rents and profits, as well as an account of all timber cut, is often ordered where the nature of the case seems to call for it (*Vide 2 Daniells' Chancery Practice, late Am. ed., 1163-1165*).

Mutual conveyances are not ordered in the settlement of boundary questions, for the reason that a settlement of boundaries does not amount to an alienation; for, as was well said by Lord Hardwicke, "if fairly made without collusion, the boundaries so settled are presumed to be the true and ancient limits" (*Penn v. Lord Baltimore, 1 Ves., Sen., R., 444, 448*). Lord Chancellor Eldon decided, in a case before him, on a bill brought by a prebendary against his lessees, who all claimed under the same lease, for a commission to ascertain the boundaries of the prebended lands, that the prebendary was entitled to have as many commissioners as his lessees (*Willis v. Parkinson, 1 Swanton's R., 9*).

In respect to the proper parties in a case in equity to settle and fix a disputed boundary between adjacent landowners, it may be affirmed generally that all who have an interest in the question must be before the court. In a case before the High Court of Chancery of England, hereinbefore referred to, which was a suit to enforce an agreement respecting the boundaries of the two proprietary governments of Pennsylvania and Maryland, Lord Hardwicke ordered the cause to stand over, that the attorney-general might be made a party in respect of the interests of the crown. The attorney-general afterward left it to the court to make a decree, so as not to prejudice the rights of the crown (*Penn v. Lord Baltimore, 1 Ves., Sen., R., 444; and vide Miller v. Warrington, 1 Jack. & Walk. R., 484*). And it has been expressly held by the same court that the remainder-man and all persons having any interest in the property are necessary parties to a bill for a commission to ascertain boundaries; for in such a case the tenant of the particular estate has no interest distinct from and independent of the estate of those in remainder, so that

a complete decree cannot be made without bringing them all before the court; in which respect a decree for the settlement of boundaries differs from one for partition, which may be made in favor of tenants for life or years for the period during which their interest continues, without affecting the holders of succeeding estates (*Rayley v. Best*, 1 *Russ. & Mylne's R.*, 659; *Atkins v. Hatton*, 2 *Austr. R.*, 386; *Baring v. Nash*, 1 *Vesey & Beame's R.*, 551.) And in consequence of this principle in another case, hereinbefore referred to, which was a suit to ascertain boundaries, the attorney-general was made a defendant, upon a suggestion of some claim on the part of the crown to the reversion, after a long lease, of which 300 years were unexpired (*Miller v. Warrington*, 5 *Jack. & Walk. R.*, 484).

It appears by one case, at least, hereinbefore referred to, that a bill may be maintained in a court of equity for relief in the case of rent, where the remedy at law by distress has become very difficult by reason of confusion of boundaries or any other cause; and that in such a case all the terre-tenants of the lands out of which the rent issues must be brought before the court, to enable it to make a complete decree (*Benson v. Baldwin*, 1 *Atkyns' R.*, 598).

With respect to the costs in suits relating to boundaries, no certain rule can be laid down. If the confusion of the boundaries has been occasioned by fraud or neglect of one of the parties, who had a duty imposed upon him to preserve the boundaries distinct, the whole of the costs of the commission would probably be thrown upon him (*Vide Grierson v. Eyre*, 9 *Vesey's R.*, 345; *Metcalf v. Beckwith*, 2 *P. Wms. R.*, 376). But where neither party has been in fault the costs may be equally apportioned between the plaintiff and the defendant, even though the interest of one may be more considerable than the interest of the other. Indeed, it was so held by Lord Hardwicke in a case before him (*Norris v. Le Neve*, 3 *Atkyns' R.*, 82). Although the costs in such cases have sometimes been ordered to be paid in a ratable proportion to the value of the estates, the boundaries of which were confused (*Vide 2 Daniells' Ch. Pr.*, late *Am. ed.*, 1165).

It may be added that it has been held that commissioners, under a commission of partition, have no lien on the commission for their charges. The same rule would doubtless be held applicable to the case of commissioners appointed to settle boundaries. In

the language of the vice-chancellor, in the partition case, "it is not competent to an officer of the court to stop in any stage of his duty, and refuse to proceed. He must go on and complete it, and may then come to the court for his remuneration. A contrary rule would be highly conducive to injustice, and favor exorbitant demands" (*Young v. Sutton*, 2 *Vesey & Beames' R.*, 365). This language is as pertinent in a case of boundary as in partition; and probably the same rule would be held to apply in both cases.

CHAPTER XXIII.

THE METHODS BY WHICH THE BOUNDARY OF LANDS IS ESTABLISHED —
THE EVIDENCE IN CASES RELATING TO BOUNDARY OF REAL PRO-
PERTY — CONSTRUCTION OF GRANTS — PAROL EVIDENCE IN CASES OF
UNCERTAINTY AND AMBIGUITY — PRACTICAL LOCATION OF BOUNDARY.

THE subject of evidence in respect to controversies relating to the boundaries of real property has been substantially treated in the preceding chapters of this work, in which the construction of grants and conveyances was considered. But it is proposed to devote another chapter to an examination of the methods by which the boundary of lands is established, and the rules of evidence governing cases relating to boundary disputes, without repeating any of the matters contained in the chapters on construction. As a general proposition, it may be affirmed that boundary may be proved or established by every kind of evidence which is admissible to establish any other fact; and, under certain circumstances, a species of evidence may be admitted in these, which might not be proper in ordinary cases. When the description of the boundary is in writing, as is most usually the fact, the instrument is first to be examined; and when that is clear there is but little difficulty in the case, except to locate it upon the ground. And here it may be remarked, that the rule requiring the best evidence relates to its grade only, and not to its conclusions. On this principle it has been decided that the evidence of a bystander is competent to prove where lines were run in a certain private survey, though the surveyor be living (*Richardson v. Milburn*, 17 *Md. R.*, 67).

In locating a deed upon the ground, the rule is generally to rely :

1. On the lines originally surveyed; 2. On lines run from acknowledged calls or corners; 3. On lines run according to the course and distance named in the deed (*Avery v. Baum, Wright's R.*, 576). The instrument itself must be in evidence, if it be possible to obtain it, and that must be interpreted according to the intent of the parties, as has been abundantly shown in another place; and to find this intent, the rule is to give most effect to those things about which men are least liable to mistake. On this principle Mr. Greenleaf, in his work on Evidence, declares, upon authority which he cites, that the things usually called for in a grant, that is, the things by which the land granted is described, have been thus marshaled: *First*. The highest regard is had to natural boundaries. *Secondly*. To lines actually run, and corners actually marked at the time of the grant. *Thirdly*. If the lines and courses of an adjoining tract are called for, the lines will be extended to them, if they are sufficiently established, and no other departure from the deed is required; marked lines prevailing over those which are not marked. *Fourthly*. To courses and distances; giving preference to the one or the other according to circumstances (1 *Greenleaf on Evidence*, § 301, note).

It has been shown in preceding chapters that it is a general and universal rule, that course and distance yield to natural and ascertained objects. But where these objects are wanting, and the course and distance cannot be reconciled, there is no universal rule that makes it imperative to prefer the one to the other. Cases may exist, in which the one or the other may be preferred, upon a minute examination of all the circumstances. This principle was illustrated in the decision of a case in the Supreme Court of the United States, many years ago, in which another important and practical rule was laid down, that in a case of doubtful construction, the claim of the party in actual possession ought to be maintained (*Preston's Heirs v. Bowmar*, 6 *Wheat. R.*, 580; and *vide same case*, 2 *Bibb's R.*, 493; also *Townsend v. Hoyt*, 51 *N. Y. R.*, 656).

Another rule laid down by the courts as to the construction of grants, and which may properly be noted here, is this: "If there are certain particulars once sufficiently ascertained, which designate the thing intended to be granted, the addition of a circumstance, false or mistaken, will not frustrate the grant" (*Jackson v. Clark*, 7 *Johns. R.*, 217, 228; *Jackson v. Marsh*, 6 *Cow. R.*, 281)

And every grant must be so construed, if possible, as to give effect to the intention of the parties. This doctrine has been fully discussed in another place. In respect to letters patent, the old Supreme Court of New York held, long ago, that if the patent was issued by mistake, or upon false suggestion, it is voidable only; and that unless letters patent are absolutely void on the face of them, or the issuing of them was without authority or prohibited by statute, they can only be avoided in a regular course of pleading. And again: "When the defect arises on circumstances *dehors* the grant, the grant is voidable only by suit. It would be against precedent, and of dangerous consequence, to permit letters patent to be impeached collaterally" (*Jackson v. Lawton*, 10 *Johns. R.*, 23). This was held in respect to a public grant, but probably the same doctrine would prevail in the case of private conveyances. If there is nothing in a patent to control the call for course and distance, the land intended to be granted must be bounded by the courses and distances of the patent, according to the magnetic meridian; course and distance yielding to a call for natural objects. All lands are supposed to have been actually surveyed, and the intention of the grant is to convey the land according to the actual survey. Obviously, therefore, the survey is competent evidence in a controversy in respect to the boundary of the land conveyed (*McIver's Lessee v. Walker*, 9 *Cranch's R.*, 173). But where plats are returned, without any actual survey having been made, and grants made pursuant to them, the general rule of construction is, that the most natural and most certain calls shall control those which are less certain and less material (*Needham v. Pryor's Lessee*, 7 *Wheat. R.*, 7). This doctrine has also been fully discussed in another place, and need not be dwelt upon here. In general, where an object is called for in a grant, the line must terminate at that object, whether it be a tree, marked line or natural boundary; unless there be something else in the grant evidencing that the object is not called for as the termination of the line. If this should be doubtful, the plat and certificate of survey may be resorted to for explanation (*Simm's Lessee v. Dickson*, 1 *Cooke's R.*, 137).

But it often becomes necessary, in cases of boundary, to resort to extrinsic evidence to aid the court in giving the proper construction of the deed or other instrument upon which the question depends; and it is desirable, therefore, to refer to some of

the rules which guide the courts in cases of this nature. Where the instrument is plain in its language, the courts interpret its meaning from the document itself. But where the conveyance or other written instrument is ambiguous or doubtful in its terms, other evidence must be resorted to to explain the document and clear up latent ambiguities, and in these cases it is important to understand the rules which have been sanctioned by the courts.

Now, it is a well-established rule of evidence that parol evidence is not admissible to vary a written document, and this rule is as applicable to questions relating to boundaries as to others. Parol evidence, however, may be admitted for the purpose of explaining the writing and removing latent ambiguities. Parcel or no parcel of the property conveyed is always a question of evidence; "and it may be laid down generally that all facts relating to the subject-matter and object of a deed, such as that the property comprised in it did or did not belong to the grantor, the mode of acquiring it, the local situations, limits, and distribution of the property, are admissible to aid in ascertaining what is meant by the words used in the instrument" (*Doe v. Martin*, 4 Barn. & Adolph. R., 785; and *vide M' Murray v. Spicer*, 5 L. R. Eq., 527; *Baird v. Fortune*, 7 Jur., N. S., 926). Upon this principle, where there are two or more monuments, either of which may be the one designated in a deed, parol evidence is admissible to show which is the monument intended. But where the description of the premises conveyed in a deed is sufficiently certain by reference to other deeds and monuments existing when those deeds were made, evidence that the grantor, when he executed the deed, pointed out a monument as the boundary, which was not the true one, would not limit the operation of the deed to the monument thus pointed out, where there was no agreement or assent on the part of the grantee (*Clough v. Bowman*, 15 N. H. R., 504).

Many cases may be cited to show that where an ambiguity, as to the location and boundaries of land, exists on the face of a deed, the court may allow evidence *dehors* the grant to go to the jury, and that such evidence is proper for their consideration. Where land was bounded by a pond, which by means of artificial works was differently raised at different times, the Supreme Judicial Court of Massachusetts decided that this constituted a latent ambiguity, and that parol evidence was admissible to show that a certain line was agreed upon and understood at the time of the

conveyance as the boundary of the pond (*Waterman v. Johnson*, 13 *Pick. R.*, 261). And the same court held that grants of adjoining land by the State, and occupation under them, and subsequent conveyances by the grantees, referring to monuments not existing at the time of the original grants, are admissible in evidence to prove the boundaries. And where such lands are described in the grant by courses and distances, without reference to monuments, it was declared that evidence of long-continued occupation under the grant is admissible for the same purpose (*Owen v. Bartholomew*, 9 *Pick. R.*, 520).

Extrinsic evidence is always admissible to explain the calls of a deed for the purposes of their application to the subject-matter, and thus to give effect to the deed. And where the true location of the land in dispute has been ascertained, parol evidence is admissible to show the proper location of all the descriptive designations and calls of the deed, to the end of determining whether or not the land in dispute passed by it, and thus give effect to the true intent of the parties (*Reamer v. Nesmith*, 34 *Cal. R.*, 624). And it has been held, in a controversy involving the location of a boundary line fixed by commissioners of partition, that monuments fixed at the time and mentioned in their written report will control distances. And that in such a case parol evidence is admissible to explain an ambiguity arising from their omission to describe the monument at one corner, and from an erroneous statement of one distance (*Hedge v. Sims*, 29 *Ind. R.*, 574).

Where monuments, for example, stakes and stones, or a tree, are referred to in a deed, parol proof is always admissible to show their location (*Vide Linscott v. Fernald*, 5 *Greenl. R.*, 496; *Claremont v. Carlton*, 2 *N. H. R.*, 373; *Blake v. Doherty*, 5 *Wheat. R.*, 359). And where a deed gives a description which has not acquired a fixed legal construction, or refers to a boundary which is variable, parol evidence is admissible to explain the deed (*Waterman v. Johnson*, 13 *Pick. R.*, 261).

The parol evidence of the surveyor who originally surveyed and located the tract of land in controversy, was held legal and competent to prove the location and survey of the tract calling to begin at the end of the lines of another tract, and to run to and intersect other tracts, and that it began at and run to particular places described on the plats (*Tenant v. Hambleton*, 3 *Har. & Johns. R.*, 233). And parol evidence has been held competent to

identify the land described in an original grant, which was produced on the trial of an action to try titles, and to establish the artificial and other marks referred to in the original plat of the land (*Foreman v. Sandefur*, 1 *Brevard's R.*, 474). Of course, the original plat of the surveyor is evidence to show the position of the land (*Alexander v. Lively*, 5 *Monroe's R.*, 159). But a private survey, made *ex parte*, without the order of the court, is inadmissible evidence, in an action of ejectment, to establish a boundary. And it was held that copies of the original maps of the surveys of lands, in Mississippi, deposited in the Surveyor-General's office, were the best evidence of the extent, character and boundaries of such surveys; and, therefore, that parol evidence that a private survey conformed to such official survey, without producing a copy of the official survey, was improper (*Surget v. Little*, 5 *Smedes & Marsh R.*, 319). A map or draft which is ancient, and has been long in use by a company under whom the defendant claimed, is held to be evidence of boundary against him (*Huffman v. McCrea*, 56 *Penn. R.*, 95). And a map which had governed the sale of lots, and had been treated for many years by the proprietors and purchasers as the original map, was held to be competent evidence to prove a boundary. But remarks made upon the map by a proprietor were declared not to be competent evidence (*Harmer's Heirs v. Morris*, 1 *M'Lean's R.*, 44). And it has been held that an ancient plan, drawn at the time of executing a deed, showing the bearing of the line betwixt the premises and an adjoining lot, is no evidence of such line, as against such adjoining owner or his grantee, unless it is first shown that he was cognizant of such plan and assented (*Whitney v. Smith*, 10 *N. H. R.*, 43). And a dotted line upon a map is not, *per se*, conclusive evidence that the line was run, but parol evidence may be introduced to explain the character of such line, and prove that it was never actually run and marked (*Newman v. Foster*, 3 *Howard's [Miss.] R.*, 383). A record of a petition and resurvey of a tract of land, subsequent to the grant of it, is not admissible to vary the boundaries and monuments of the original grant (*Osborn v. Coward*, 2 *Murphy's R.*, 77). And where a conveyance declares a fact, as that the land adjoins a river or street, parol evidence cannot be received to show that it does not; that is to say, unless the description contains a latent ambiguity or be found false, and therefore to be rejected (*Pride v. Sweet*, 1 *Apple-*

ton's *R.*, 115). Upon a question which of two lines was a division line, a deed and draft were produced containing evidence that one line had been made some years before the other. The Supreme Court of Pennsylvania held that a mark on a tree on that line, of the same age as was indicated on the draft, was but slight evidence that such was the line, in the absence of other marks on the line (*Venango, etc., Oil Co. v. Lewis*, 62 *Penn. R.*, 383).

Evidence of the possession of settlers on adjacent tracts in reference to a *division* line, attempted to be shown as recognized by one of the parties in a suit, was held by the old Supreme Court of the State of New York to be admissible (*Rockwell v. Adams*, 6 *Wend. R.*, 467). But the case was taken to the Court of Errors, and the judgment of the Supreme Court reversed, and the evidence, without explanation, under the circumstances of the case, was declared to be incompetent, as being calculated to divert the attention of the jury from the true question in issue between the parties (*Rockwell v. Adams*, 16 *Wend. R.*, 285). It was assumed in the Court of Errors that there was no ambiguity or uncertainty as to the location of the boundary in question by the terms of the grant; and that being the case, the evidence, abstractly considered, would not be competent. Where the lines and boundaries of land are fixed and can be identified, a verbal *agreement*, even by the parties interested, to fix the lines or boundaries different, would not be binding. This is well settled by authority. But where there is doubt as to the identity of the dividing lines the rule is quite different. And, probably, in a case where the parties were really ignorant of the true lines, and they cannot be positively identified by the ordinary proofs, the corresponding lines of settlers, as recognized without question for a long time, would be admissible as evidence to establish a disputed line upon the same tract.

The Supreme Court of Maine has held, in an action to determine the boundary line between the adjacent lands of two parties, that a deed, given by the original grantor of the demandant (but dated after his deed) to a third person, from whom the tenant, by mesne conveyance, derived his title, was admissible evidence for the consideration of the jury in favor of the tenant, when coupled with testimony tending to prove that the line was in accordance with his claim (*Chase v. White*, 41 *Maine R.*, 228).

It has been held that, where the true original line between two

towns is the true line of division between the lands of individuals, the perambulations of the said line by the selectmen of the towns were evidence to show the boundary between the lands of those individuals; though an adjudication of the Court of Sessions, establishing the said line, in a snit between the two towns, was held not to be competent evidence of the true line between such individuals (*Lawrence v. Haynes*, 5 N. H. R., 33). Parol evidence is admissible to show that the course and boundary in a survey and patent are incorrectly stated, and that they are otherwise on the ground (*Magrehan v. Adams*, 2 Binney's R., 109; *Conn. v. Penn.*, *Peters' C. C. R.*, 496; *Reed v. Langford*, 3 J. J. Marshall's R., 420). But where a deed conveys a specific number of acres of land, and no corner is named in the deed, parol evidence is held not to be admissible to establish a line, in contradiction to the deed, which shall contain less land than the specified quantity (*Herring v. Wiggs*, 2 Taylor's R., 34). And where the description in a deed is made by course and distance, without reference to any monument, parol evidence is not admissible to vary the course and distance given (*Hamilton v. Caywood*, 3 Har. & McHen. R., 437; *Reid v. Schenck*, 2 Dev. R., 415; and vide *Conn. v. Penn.*, *supra*).

Where a deed of lands refers to another deed for the description of the premises, the contents of that other deed cannot be proved by parol, but the deed must be produced, if in existence and can be found (*Jackson v. Parkhurst*, 4 Wend. R., 369). And where a lost deed should accompany the ownership as an essential muniment of title, no necessity will dispense with the proof by parol of the contents, that is to say, of the operative parts of the instrument (*Metcalf v. Van Benthuyzen*, 3 N. Y. R., 424).

Evidence of what is called a practical location of the boundaries of real property is often competent in cases of controversy respecting division lines, and it is sometimes difficult to determine whether such evidence should be received or rejected. The rule in such cases has been judicially stated thus: Where there can be no real doubt as to how the premises should be located according to *certain* and known boundaries described in the deed, to establish a practical location different therefrom, which shall deprive the party claiming under the deed of his legal rights, there must be either a location which has been acquiesced in for a sufficient length of time to *bar a right of entry* under the statute of limita-

tions in relation to real estate, or the *erroneous line* must have been *agreed upon between the parties* claiming the land on both sides thereof, or the party whose right is to be barred must have silently looked on, and seen the other party doing acts, or subjecting himself to expenses in relation to the land on the opposite side of the line, which would be an injury to him, and which he would not have done if the line had not been so located; in which case, it has been said, *perhaps a grant might be presumed* within the statutory limit (*Adams v. Rockwell*, 16 Wend. R., 285, note). But to establish a practical location which is to divest a party of a clear and conceded title by deed, the extent of which is free from all ambiguity or doubt, the evidence establishing such location should be clear, positive and *unequivocal*. In the language of an eminent judge, there can be no doubt that a line run with the full knowledge of all the adjoining owners, or under circumstances from which such knowledge may be reasonably inferred, clearly designated, and generally recognized and acquiesced in by those concerned, by repeated and unequivocal acts for a long period, must control, and cannot be disturbed, whether it passes through cultivated or wild lands. It would be most unreasonable to deny to the owners of uncultivated and wild lands the right to settle their common boundary line; and if they can do that by positive agreement, such agreement may be inferred from their unequivocal acts, and is as operative when thus proved as if it had been inserted in a deed. In such cases, the establishment of a line is not deemed to be, nor does it acquire validity as a conveyance of a new title, but it simply ascertains and determines the extent of lands held under pre-existing titles. It was accordingly held in the case that recognition of and acquiescence in the settlement of a line by the trustees of Rochester, holding the legal title, and, by their *cestuis que trust*, the inhabitants of the town for more than twenty-five years, is conclusive, without attributing any effect to the settlement deed, more than if a parol agreement between the parties as to the boundary. It was further decided that the effect of such acquiescence is not confined to parts of the line where there had been actual occupation, or other distinct act of claim or recognition; but a line run with such publicity, clearly designated and generally recognized and acquiesced in by those concerned by repeated and unequivocal acts, for so long a period (over seventy years in the case under consideration), must control, whether it

passes through cultivated or wild lands (*Hunt v. Johnson*, 19 *N. Y. R.*, 279; *but vide Townsend v. Hayt*, 51 *ib.*, 656).

It was laid down in the late Court of Errors of the State of New York that, to deprive a man of his absolute right to the unquestioned fee of his land, according to the doctrine of the courts, regardless of or according to the construction which they have given to the statute for the prevention of frauds and perjuries, it should appear most clear and distinct, without the shadow of a doubt, and by testimony the most convincing and satisfactory, that there was an express agreement made between the owners of the adjoining lands, deliberately settling the exact, precise line or boundary or location between them, and an acquiescence therein for a *considerable time*; or, in the absence of proof of such agreement, it should be as clearly, distinctly and satisfactorily shown that the party claiming has had possession of the lands claimed up to a certain visible known line, with the express knowledge and assent of the owner of the adjoining lands, and his acquiescence in such possession, adverse to and in defiance of his rights; and this for a *considerable time*. What this considerable time is has not been limited or defined, is quite vague and uncertain, and must necessarily depend upon the particular circumstances of each case. In all cases in which practical locations have been confirmed upon evidence of this kind, the acquiescence has continued for a long period, — rarely less than twenty years. In one case the erroneous line had been acquiesced in thirty-six years (*Jackson v. Bowen*, 1 *Cuines' R.*, 358); in another it was forty years (*Jackson v. Vedder*, 3 *Johns. R.*, 8); in another it was thirty-eight years (*Jackson v. Dieffendorf*, 3 *Johns. R.*, 269); in another it was forty-one years (*Jackson v. McCull*, 10 *Johns. R.*, 377); and in the case of *Hunt v. Johnson*, before referred to, the time was seventy years; while in one case an acquiescence of four or five years (*Kip v. Norton*, 12 *Wend. R.*, 127), and in another an acquiescence of eleven years (*Adams v. Rockwell*, 16 *Wend. R.*, 285), were held insufficient.

In respect to practical location, Chief Justice Savage said, in one case: "Cases of this description (cases of location and acquiescence) have been frequently before the court. The principle upon which they have all been decided is that, where parties agree upon a division line, either expressly or by long acquiescence, such line shall not be disturbed; buildings and permanent

improvements may be made upon the faith of the location of the line; transfers may be made, and to permit such lines to be altered might be productive of incalculable injury" (*McCormick v. Barnum*, 10 *Wend. R.*, 104). Again, in another case, the same distinguished judge repeated the doctrine: "An assent to a location must be either express or implied. If there is a disputed line between two adjoining proprietors of land, it may be settled between them by a location made by both, or made by one and acquiesced in by the other, for *so long a time* as to be evidence of an agreement to the line. There can be no doubt that an express parol agreement to settle a disputed or unsettled line is valid, if executed immediately, and possession accompanies and follows such agreement. So, also, where there has been no express agreement, long acquiescence by one in the line assumed by the other is evidence of an agreement" (*Kip v. Norton*, 12 *Wend. R.*, 127). And it was said by the court, in an early case before the old Supreme Court of the State of New York: "After the parties have *deliberately settled* a boundary line between them, it would give too much encouragement to the spirit of litigation to look beyond such settlement, and break up the line *so established* between them" (*Jackson v. Corlear*, 11 *Johns. R.*, 123).

A distinguished judge of the Court of Appeals of the State of New York excepts to the ground that the rule in question is based upon the idea of an agreement, express or implied, as to the location of the line, and argues that it is an error to assume that a parol agreement, either actual or supposed, fixing the boundaries to lands, lies at the foundation of the rule. He says: "It is true that several of the cases make this suggestion, and speak of the long acquiescence of the parties as affording evidence of such an agreement. It is difficult, however, to support the rule upon such a basis. If acquiescence for a great number of years in an erroneous location is obligatory upon the parties merely as evidence of a previous parol agreement, then it must follow that any other proof establishing such an agreement would be equally conclusive upon them. If it is the agreement which binds, the nature of the proof, provided it be competent, is of course immaterial. * * * It seems impossible to hold that a mere parol agreement, adopting a line different from that described in the deed, is obligatory without violating the statute of frauds, both in its letter and spirit. * * *

The rule seems to have been adopted as a rule of

repose, with a view to the quieting of titles; and rests upon the same reason as our statute prohibiting the disturbance of an adverse possession which has continued for twenty years." And the views of the learned judge were adopted as the doctrine of the court; and it was accordingly held that the acquiescence of adjoining proprietors for forty years in the practical location of a boundary line between their lands is conclusive, although it be proved that such location was originally made under an agreement resulting from a mutual mistake as to facts. It was, however, conceded in the case that there were cases in which an express agreement, recognizing an erroneous boundary, will conclude a party; as where the other party, acting upon the faith of such agreement, has made expensive improvements, the benefit of which will be lost to him if the line is disturbed. But it was claimed that such cases, if they exist at all, rest upon the principle of *estoppel in pais* (*Baldwin v. Brown*, 16 *N. Y. R.*, 359; and *vide Tyler on Ejectment and Adverse Enjoyment*, 571-575).

The Supreme Court of New Hampshire has declared the doctrine, that a practical location is but an actual designation by the parties, upon the ground, of the monuments and bounds called for in a deed; and it was held in the same case that prior negotiations in regard to the boundaries of land will not be admissible to control the boundaries afterward delivered (*Wells v. Jackson, etc., Co.*, 47 *N. H. R.*, 235). And the Supreme Court of Texas has recently affirmed that, although the presumption in favor of a boundary line acquiesced in by adjoining proprietors is strengthened by lapse of time, there is no period fixed by the Texas statute which will render the presumption conclusive. Each case, it was said, must furnish its own circumstances modifying the conclusiveness of the presumption (*Floyd v. Rice*, 28 *Texas R.*, 341).

The Supreme Court of California has held that, if either of one or two or more objects will answer the call of a deed, so that the line will run in two or more positions and still harmonize with the other calls, the parties to the deed may adopt either line, and, where one is thus established, that it concludes both parties. But it was said, that acquiescence of the parties for the term of five years in the line thus established would probably be requisite to give validity to a line not located according to the calls of the deed; but that, where the parties, by running and marking the line upon the land, identify a call which from the language of the

deed is left in uncertainty, acquiescence will add nothing to the conclusiveness of the location of the line (*Hastings v. Stack*, 36 Cal. R., 122).

It has been declared in several cases that, if a dividing line be settled by parol agreement and actual location between the owners of adjoining tracts of land, such location will be received as strong evidence of the accuracy of the line thus established, though it is not conclusive to prevent either party from showing that it was settled erroneously (*Gove v. Richardson*, 4 Greenl. R., 327; *Avery v. Baum*, *Wright's R.*, 576). And the Court of Appeals of the State of New York have recently decided that practical location or an acquiescence, for a less term than the statutory period to bar an entry, in an erroneous boundary line cannot be claimed to the exclusion of evidence of the true line, where the premises were wild and uncultivated and practically unoccupied (*Townsend v. Hayt*, 51 N. Y. R., 656). And the same distinguished court have also lately held that a parol assent of one of the parties, as to the location of a boundary fence between adjoining owners, and the actual erection of the fence by the other, in accordance with such assent, followed by mutual occupation and acquiescence in such location of the boundary for a few months, is not sufficient to change the true line, or to preclude the assenting party from asserting his rights, in accordance with such true line. And one of the learned judges stated that mutual consent to the location of a boundary in dispute, followed by long acquiescence and by mutual occupation in conformity therewith, had been held to conclude both parties, but that such acquiescence must have continued for a long period, scarcely less than that of the statutory period, to bar an entry (*Reed v. McConet*, 41 N. Y. R., 435). And the same doctrine was held in the same court at a little later date, when it was declared that, to constitute a practical location of a lot, or line, the mutual act and acquiescence of the parties is requisite; that it must be actually located and acquiesced in for a long time, *probably* not less than twenty years, the statutory period in New York to mature a title by adverse possession. And it was further held, in the same case, that to estop a party from asserting his title to lands, on the ground that he has encouraged and permitted another to make valuable improvements near them, it is not enough that the premises are convenient, or even beneficial to such other party; that they must be so far essential

that it would work material and serious mischief to the party to allow the claim (*Corning v. The Troy Iron and Nail Factory*, 44 *N. Y. R.*, 577; and *vide Raynor v. Timerson*, 51 *Barb. R.*, 517). After the original monuments are gone, and such a period of time has elapsed that no one can be found who remembers to have seen them, or can testify to their location, uniform continued occupancy, by buildings, fences or other equivalent indications of ownership, is evidence that the land was located according to the original monuments (*Cutts v. King*, 5 *Greenl. R.*, 482). But where the description of the premises conveyed in a deed is sufficiently certain by reference to other deeds and monuments existing when those deeds were made, evidence that the grantor, when he executed the deed, pointed out a monument as a boundary, which was not the true one, would not amount to a practical location, nor limit the operation of the deed to the monument thus pointed out, there being no agreement or assent on the part of the grantee (*Clough v. Bowman*, 15 *N. H. R.*, 504).

CHAPTER XXIV.

EVIDENCE IN BOUNDARY CASES — USAGE AND HEARSAY TESTIMONY — DECLARATIONS OF PARTIES TO GRANTS AND DECEASED WITNESSES.

THE rule is well settled that all ancient grants may be explained by evidence of modern usage, in order to discover what passed by such documents. The doctrine has more frequently been applied in Great Britain than in this country, but it is of universal application. In England, modern acts of ownership have been admitted to show that ancient grants of King John and Edward I included the sea-coast down to low-water mark (*The Duke of Beaufort v. The Mayor of Swansea*, 3 *Exchequer R.*, 413; *The Attorney-General v. Jones*, 2 *Hurlstone & Coltman's R.*, 347; *L'Estrange v. Rowe*, 4 *Foster & Finlayson's R.*, 1048); to show whether the words "river L." in an ancient patent comprised the bed of the river down to the point where it reached the sea, or only down to a certain ford some distance up the river (*Marquis of Donegal v. Lord Templemore*, 9 *Irish Com. Law R.*, 374; *In re Belfast Dock*, 1 *Irish Eq. R.*, 128); also to show that the

sea-shore is parcel of a manor (*Calmady v. Rowe*, 6 *Com. Bench R.*, 861; and *vide Waterpark v. Fennell*, 7 *House of Lords Cases*, 650, 684; *Attorney-General v. Drummond*, 1 *Drury & Walsh's R.*, 353; *Baird v. Fortune*, 7 *Jurist, N. S.*, 926).

Some cases to the same effect are to be found in the American reports, though the doctrine is there more generally applied to deeds which are ambiguous or doubtful in their terms than to deeds which may be considered ancient. In an early case before the old Supreme Court of the State of New York, the question arose under a deed which gave the grantee the privilege of cutting timber, for building on the premises, from the woods of the grantor. The court held that evidence of usage, with the knowledge of the grantee and his heirs, to cut timber for fencing, was admissible to show the intention of the parties to apply the word building to the making of fences. And Spencer, Justice, in giving the opinion of the court, says, if the words are equivocal, evidence of usage ought to be admitted as the best expositor of the intention of the parties; but if the words of a deed are clear and precise, leaving no doubt of the intention of the parties, usage will not aid in the exposition, and ought not to be admitted. And the learned justice goes on to cite cases to show that such evidence is proper only in cases of ancient deeds, and where there is an uncertainty as to what was meant by the terms made use of by the parties (*Livingston v. Ten Broeck*, 16 *Johns. R.*, 23). This case has often been referred to by the courts, both of this country and England, and its doctrines have been invariably approved. Of course, it is well understood that deeds are to be expounded by their terms where there is no ambiguity, and neither parol evidence nor usage can be admitted to vary or contradict a written instrument. But where the words of a deed, and especially those of an ancient deed, are equivocal or doubtful, the usage of the parties under the deed is admissible to explain them.

Another leading case in England may be cited upon the same question, in which there was strong and uniform evidence that the castle of A. had, for two centuries past, formed part of the hundred of Broxtowe. The court held that the mention in Domesday Book of the town of A. previously to the enumeration of the hundreds in the county, inquisitions taken by jurors of the town of A. upon deaths in the castle of A., and a charter erecting the town of A. into a county of itself, with the special

exception of the castle of A., were not so clearly inconsistent with the long usage and reputation in modern times as to negative the inference that the castle was part of the hundred (*The Duke of Newcastle v. Hundred of Broctowe*, 1 *Neville & Manning's R.*, 507; *S. C.*, 4 *Barn. & Adolph. R.*, 273).

This brings us naturally to the consideration of the admissibility of hearsay evidence on questions of boundaries. And upon this subject it is an old rule that, in questions concerning public rights, common reputation is admitted in evidence, and this extends to questions upon boundary between parishes or manors. But when the question is upon a boundary between private individuals different principles are involved, although, in the latter case, the evidence is often received. The learned editors of "Notes to Phillips' Treatise on the Law of Evidence" regard the admissibility of hearsay evidence on questions of public right as well established upon authority; so much so, "that judges, the most fastidious in regard to this kind of evidence, do not pretend to dispute its competency, however widely they may differ upon its force and effect;" and they refer to several English authorities which exemplify the doctrine. But, they observe, "private rights are entirely another affair. How far hearsay may be brought to bear upon those which are of an incorporeal nature we shall leave mainly to the discussions in the text. These rights are a branch of learning more peculiarly belonging to England, where they so extensively prevail, and depend so much on ancient usage as often to call for hearsay, which is almost the only remnant of evidence left. It may be set down, therefore, that on this subject the limits of hearsay evidence have been as far enlarged as considerations of safety would warrant. In going beyond them, we should violate the best dictates of experience.

"But in settling the litigated boundaries of corporeal property no courts have, probably, been more extensively engaged, or upon questions of greater difficulty, than the American. In conducting the inquiry, therefore, how far can hearsay be brought to bear on the boundaries of private property, while the English decisions are, doubtless, as usual, very high evidence of the common law; yet American courts ought not hastily to be condemned, though they may appear to have gone beyond them. It will, we think, be found that England has furnished the principle upon which the American cases may be sustained to a certain extent; though we

have in some respects gone far beyond them. * * * It will be seen by the professional reader that not only certain lots of land, tracts of land or patents, may thus become the subject of hearsay evidence, but their lines, and objects in their ambit, may be and very commonly are dependent entirely on hearsay. A patent or farm is granted to run along the Hudson river. Hearsay or reputation comes in to tell us what stream bears that name, and to distinguish it from its tributaries, the Sacundaga or the Scaroon. The Kayaderosseras patent was granted running on one line to the *south-westmost head* of a creek entitled *Kayaderosseras*. Public reputation was called in to fix the real head of that creek, and distinguish it from the head of the *Coesa* creek, which had been assumed as the true object of the line in a survey for the defendants (*Brandt ex dem. Walton v. Ogden*, 1 *Johns. R.*, 156, 157, *per* Spencer, J.). Another object in the same patent was the *third falls* of Albany river (Hudson), and reputation for forty years was called in to determine whether the *third falls* were *Baker's* or *Fort Miller* falls on the Hudson (3 *Quin R.*, 6, *S. C.*). In this view of the question Henderson, J., speaks in *Den ex dem. Tate v. Southard* (1 *Hawks*, 45, 47): 'Boundaries,' says the judge, 'frequently exist in common reputation; and it is for that reason that hearsay is evidence upon the question of boundary. It would, therefore, have been sufficient for the defendant to have shown that it was the common reputation and understanding of the neighborhood that his land was bounded by the lines of surrounding tracts.' Evidence was also received in that cause, that two different persons, now (at the trial) dead, had the one shown a branch to the witness as one line, and another a certain place in the road as another line of the land in dispute. * * * It is obvious, as we have seen, that, to a certain extent, hearsay must be adopted as evidence in the designation of boundaries. They are, many times, the mere creatures of general reputation (2 *Roll. Abr.*, 186, pl. 5; 17 *Vin.*, 86, pl. 5). Where this is the case, all courts must receive evidence of *general* hearsay" (1 *Cowen & Hill's Notes*, 629-631).

The Supreme Court of Florida, a few years since, held that hearsay evidence of ancient boundaries is admissible, when the lapse of time is so great as to render it difficult to prove a boundary line by the existence of the positive landmarks, or other evidence than hearsay (*Daggett v. Willey*, 6 *Florida R.*, 482). And the

Supreme Court of Alabama has decided that the boundaries of a *public* lot may be proved by general reputation. But whether such evidence would be admissible in the case of a *private* lot, the court raised a *quære*, and left it undecided (*Farmer's Heirs v. Mayor of Mobile*, 8 Ala. R., 279).

Mr. Justice M'Lean well expresses the doctrine upon this subject, in a case before the Supreme Court of the United States in 1832. He says: "That boundaries may be proved by hearsay testimony, is a rule well settled; and the necessity or propriety of which is not now questioned. Some difference of opinion may exist as to the application of this rule, but there can be none as to its legal force.

"Landmarks are frequently formed of perishable materials, which pass away with the generation in which they are made. By the improvement of the country, and from other causes, they are often destroyed. It is therefore important, in many cases, that hearsay or reputation should be received to establish ancient boundaries; but such testimony must be pertinent, and material to the issue between the parties. If it have no relation to the subject, or if it refer to a fact which is immaterial to the point of inquiry, it ought not to be admitted" (*Boardman v. Lessees of Reed and Ford*, 6 Peters' R., 328, 341). And in an early case in Virginia, involving the boundary of a corner lot in the city of Richmond, the court said: "If the original survey of the town was erroneous, either because it was made without regard to horizontal distances, or from other causes or accidents, and the property has been sold, and held according to such survey, it is now too late to correct such error. Ancient reputation and possession, in respect to boundaries of streets, are entitled to infinitely more respect, in deciding upon the boundaries of the lots, than any experimental survey that can be made. If not, the whole city, and all other towns, would be thrown into the utmost confusion" (*Ralston v. Miller*, 3 Randolph's R., 44, 49).

The admissibility and influence of hearsay and reputation, in respect to boundaries, was examined by Judge Washington, in the Circuit Court of the United States, in a case which arose in Pennsylvania, and in which two surveys were given in evidence which differed in important particulars. On the subject of these surveys, and what would be proper evidence in such circumstances, the learned judge said: "No gentleman of the profession, who is

at all conversant with land trials, can be ignorant that the courses and distances laid down in a survey, especially if it be ancient, are never in practice considered as conclusive; but, on the contrary, they are liable to be materially changed by oral proof, or other evidence tending to prove that the documentary lines are not those actually run. How often have we known reputed boundaries, proved by the testimony of aged witnesses, and even by hearsay evidence, established in opposition to the most precise calls of an ancient patent. Such evidence has been constantly received; and distances have been lengthened or shortened without the slightest regard to the calls of the patent. The reason is obvious; it is not the lines reputed, but the lines actually run by the surveyor, which vest in the patentee the area included within these lines. The survey returned, or the patent, is the evidence of the former; natural marks or reputation is, in almost all cases, the evidence of the latter. The mistakes committed by surveyors and chain carriers, more particularly in an unsettled country and wilderness, have been so common and are so generally acknowledged as to have given rise to a principle of law, as well settled as any which enters into the land titles of this country; which is, that when the mistake is shown by satisfactory proof, courts of law as well as courts of equity have looked beyond the patent to correct it. It will readily be admitted that such evidence should be cautiously received, if it should have a preponderating influence in determining the question of boundary. Subsequent locaters look, in the first instance, to the survey as made and returned, for a demarkation of the tract; with which they must not interfere. But if a mistake is apparent upon the face of the survey, taken in connection with the natural and artificial marks on the ground, if the reputation of the neighborhood has assigned to the tract of land so surveyed boundaries different from those delineated on the survey returned, a subsequent location is so far affected by notice of the real boundaries of the tract on which it would adjoin, that a claimant under it cannot, even in a court of equity, set up his posterior equitable title against the legal or equitable title of the first locater. In short, he cannot assert that he was a purchaser without notice, in the face of strong evidence to the contrary" (*Conn. v. Penn.*, 1 *Peters' C. C. R.*, 496).

The Supreme Court of Errors of the State of Connecticut have decided, as a point of local law at least, that traditionary evidence

is admissible to prove private boundaries. In a case before the court in 1839, Church, J., said: "In England such testimony has always been received to prove facts of a public or general nature, as in the present case. In this State we have extended it yet further, and have admitted it to prove the boundaries of lands between individual proprietors" (*Wooster v. Butler*, 13 Conn. R., 309, 315). And in another case, decided by the court in 1845, Storrs, J., said: "Within whatever limits the rule of evidence as to the admissibility of reputation on questions of boundary is restricted elsewhere, it is well settled in this State that general reputation is admissible for the purpose of showing not only public boundaries, such as those between towns, societies, parishes and other public territorial divisions, but also the boundaries of lands of individual proprietors" (*Kinney v. Farnsworth*, 17 Conn. R., 355, 363; and *vide, also, Higley v. Bidwell*, 9 ib., 447).

The same doctrine has been expressly laid down in the State of North Carolina. In one case before the Supreme Court of the State the learned chief justice observed: "We have, in questions of boundary, given to the single declarations of a deceased individual, as to a line or corner, the weight of common reputation, and permitted such declarations to be proven, under the rule that, in questions of boundary, hearsay is evidence. Whether this is within the spirit and reason of the rule, it is now too late to inquire. It is the well-established law of this State. And if the propriety of the rule was now *res integra*, perhaps the necessity of the case, arising from the situation of our country, and the want of self-evident *termini* of our lands, would require its adoption. For, although it sometimes leads to falsehood, it more often tends to the establishment of truth. From necessity we have, in this instance, sacrificed the principles upon which the rules of evidence are founded" (*Den d. Sasser v. Herring*, 3 Devereaux' Law R., 340; and *vide Den d. Tate v. Southard*, 1 Hawks' R., 45).

The Special Court of Appeals of Virginia, somewhat recently, declared that, in questions of boundary, natural landmarks, marked lines, and *reputed boundaries*, especially if known to and acquiesced in by the parties interested, should be preferred when in opposition to mere magnetic lines, unless there was a known mistake in the marked line (*Coles v. Wooding*, 2 Patton & Heath's R., 189). Indeed, it is well settled that boundaries may be proved, under certain circumstances, by hearsay evidence; but

it must amount to *common tradition* or *repute* (*Cherry v. Boyd*, 6 *Littell's R.*, 7). And neighborhood report can never be received to contradict record evidence in respect to boundary or any other matter (*McCoy v. Galloway*, 3 *Ham. R.*, 283).

On similar principles upon which tradition is received to prove a boundary, the declarations of deceased persons, and sometimes the statements of living witnesses, have been received in evidence to establish boundaries of land. The English authorities are numerous to this point; and it has been judicially declared that, on questions of private as well as public boundaries, the tendency of American decisions is to admit declarations of deceased persons who were in a situation to possess information on the subject, and who were not interested, even when the declarations are no part of the *res gestæ* (*Stroud v. Springfield*, 28 *Texas R.*, 649; *Great Falls Company v. Worster*, 15 *N. H. R.*, 412). And in another recent case, decided by the Supreme Court of Vermont, it appeared that it had been agreed between the parties in interest that of two surveys, made respectively in 1806 and 1808, the second was the true range line; and it appearing that, in 1830, an original proprietor of the land in controversy, then an old man, since deceased, one of the survey committee, and long the custodian of the proprietor's records, had at his house, distant three or four miles from the land, declared to the witness, a surveyor who had taken a copy of the plan of the surveys, that "when he should survey in the fifth division, he would find two range lines between lots Nos. 14 and 15, and that the west line was the true one." The court held this declaration to be admissible as evidence, although unaccompanied by a pointing out or showing of the premises. It appeared that the old man owned a lot in the fifth division, bounded by the same range line, and the declaration was against his own interest; and that was regarded as a material fact upon the point (*Powers v. Silsby*, 41 *Vt. R.*, 288; and *vide Smith v. Chapman*, 10 *Gratt. R.*, 445).

There seems to be no doubt of the rule that, where the party claims title to the land in dispute by adverse possession, the declarations of a former occupant, under whom the party claims, are admissible as evidence to characterize his possession as adverse to any title of the plaintiff. Upon this subject Mr. Greenleaf says: "In regard to the declarations of persons in possession of land explanatory of the character of their possession, there has been

some difference of opinion ; but it is now well settled that *declarations in disparagement of the title of the declarant* are admissible as original evidence. Possession is *prima facie* evidence of seisin in fee simple ; and the declaration of the possessor that he is tenant to another, it is said, makes most strongly against his own interest, and therefore is admissible. But no reason is perceived why every declaration accompanying the act of possession, whether in disparagement of the claimant's title or otherwise justifying his possession, if made in good faith, should not be received as part of the *res gestæ* ; leaving its effect to be governed by other rules of evidence" (1 *Greenl. Ev.*, § 109 ; and *vide Morss v. Salisbury*, 48 *N. Y. R.*, 636).

In a late case before the Supreme Court of the State of New York evidence was offered by the defendant that he had claimed his north line to be a straight line, and claimed the east and west lots as his ; that he had got sixty acres and the bluff thrown in, and these together run up to this straight line on the north side ; that he claimed a certain corner, where he directed the fence to be fixed, as his corner, and spoke of a rock on or near the end of Pratt's wall as on his line ; and claimed a certain pile of stones and a big rock as his corner ; and claimed to own a certain lot, and to own up to the north fence. The evidence was objected to on the trial, but admitted, and the ruling was affirmed at General Term. Hogeboom, J., gave the opinion of the court, and, on this question, said : "I am inclined to think that, in connection with the facts and circumstances proved in the case, that all this evidence was admissible, either as showing a claim of title to land which the defendant or Brandow held adversely to the plaintiff, or as characterizing the nature, manner and extent of the defendant's possession" (*Morss v. Jacobs*, 35 *How. Pr. R.*, 90, 96). But it had been previously declared by the same court that the declarations of one in possession of land cannot be admitted for the purpose of showing that an incumbrance upon the land existed when the person had sold and conveyed the land to a *bona fide* purchaser, although it was *held* that such declarations were admissible as against a mere volunteer (*Burlingame v. Robbins*, 21 *Barb. R.*, 327).

It has been declared by the Supreme Court of Maine that the declarations of a former owner of land, made while he was proprietor of the estate, respecting the extent and boundaries thereof,

are competent, though not conclusive evidence against those claiming under him (*Treat v. Strickland*, 10 *Shep. R.*, 234; and *vide Melvin v. Marshall*, 2 *Foster's R.*, 379). And in a well-considered case, decided by the Supreme Court of Errors of Connecticut, it was said by Waite, J., who delivered the opinion of the court, that, upon recurring to the authorities, the rule seemed to be well settled in that State, "that the declarations made by the owner of real estate, adverse to his title, are admissible in evidence, not only against him but all others claiming title to the same lands under him." After citing the authorities, the learned judge observed: "So far the rule has gone, but no further; and courts, in laying it down, have been very careful to limit it, in its operation, to cases where the evidence is offered against the interest of the party making the declarations or those claiming under him. We are clearly of opinion that the rule ought not to be extended. The presumption is that the declarations of a party as to his title, made against his interest, are true. But, on the other hand, to allow him to make declarations in support of his title, and then give those declarations in evidence, would, in effect, be to allow him to make evidence in his favor at his pleasure" (*Smith v. Martin*, 17 *Conn. R.*, 399, 401).

It has been recently judicially declared, as before stated, that, in questions of private as well as public boundaries, the tendency of American decisions is to admit declarations of *deceased* persons who were in a situation to possess information on the subject, and who were not interested, even when the declarations are no part of the *res gestæ*; although it was held, in the case in which the declaration was made, that proof of ancient boundaries by common reputation must have reference to a time *ante litem motam* (*Stroud v. Springfield*, 28 *Texas R.*, 649).

The Supreme Court of Appeals of the State of Virginia have held that declarations by a surveyor, or chain-carrier, or other persons present at a survey, of the acts done by or under the authority of the surveyor in making the survey, if not made *post litem motam*, and the person is dead, are admissible evidence upon a question of boundary (*Overton v. Davisson*, 1 *Gratt. R.*, 211).

Upon this subject, it is said in Cowen & Hill's Notes: "A majority of the American decisions are, it is true, opposed to the objection that these declarations concerning boundary shall be excluded, by reason of being made *post litem motam*. It existed,

but appears to have been overlooked by counsel, in *Howell's Lessee v. Tilden* (1 Har. & M'Hen., 84); and in a subsequent case, hearsay declarations of D. and his wife, made while they were in possession, and after a dispute had arisen between them and the adverse claimants, were received in favor of one claiming under D. and wife, according to the very boundaries to which their previous declarations related. These declarations were expressly objected to as being made after the controversy had arisen (*Redding's Lessee v. M'Cubbin*, 1 Har. & M'Hen., 368). But they might perhaps have been received as a part of the *res gestæ*, D. being in possession, according to the rule, *ante*, note 452, page 596, *et seq.*; though *Shepherd v. Thompson* (*infra*) is *contra*. In other cases, it was held that what one deceased person swore under a commission to take evidence respecting the boundaries, which commission was irregularly executed, and so the oath not receivable as a deposition, should yet come in as hearsay (*Bluden's Lessee v. Cockey*, 1 Har. & M'Hen., 230; *Long's Lessee v. Pallett*, *Ib.*, 531; *Weem's Lessee v. Disney*, 4 Har. & M'Hen., 156). In another case, the court received mere *ex parte* depositions, showing the declarations of the proprietors and the reputation of the neighborhood as to a certain fence being the division line between the parties litigant (*Sturgeon's Lessee v. Waugh*, 2 Yeates, 476). So a voluntary affidavit, both parties being present, though objected to, was received to show that a survey made by S. excluded the *locus in quo* (*Montgomery's Lessee v. Dickey*, 2 Yeates, 212). The court said it was better than ordinary hearsay or reputation. (And see *Lilley's Lessee v. Kintzmiller*, *Ib.*, 28).

“While it must be confessed that these Maryland and Pennsylvania cases have proceeded in utter disregard of the rule repudiating declarations as made *post litem motam*, yet they were mostly, if not all, made before this rule was well established, even in England; other and more recent cases came back to that rule. In *Spear v. Coate* (3 M'Cord, 227), the court received declarations touching boundary, made *ante*, but rejected those made *post litem motam*, by the same witness. * * * In all these cases where these declarations have been received, it was first made to appear that the declarant was dead; and several cases have expressly decided that this is an essential condition. * * * It is obvious, however, that, in this and all other cases where hearsay testimony is admissible, a distinction must be made, as to proving the death

of declarants, between particular declarations coming from individuals and general reputation. In the former case death must be proved. In the latter it is never required. The difference is acted upon every day at the circuit, in questions of general reputation upon other subjects. * * * After the practice of receiving particular declarations had gained a foothold at the circuit, it was obvious that the more important of this kind of posthumous testimony would be sought at the hands of deceased surveyors" (1 *Cow. & Hill's Notes*, 633, 634).

In an early case before the Supreme Court of Pennsylvania, the plaintiff claimed a parcel of land according to the survey of one W., who was dead, and his declarations were received in evidence to prove his survey; in which, Tilghman, Ch. J., said: "When boundary is in question, what has been said by a deceased person is received in evidence. It forms an exception to the general rule. It was impossible for the plaintiffs to show the extent of their possession without showing the lines run by W. Those lines were the plaintiffs' boundaries; at least, such was their claim. It appears to me, therefore, that what was said by W. comes within the exception which admits the words of a deceased person to be given in evidence in a matter of boundary" (*Cunfuran v. The Presbyterian Congregation of Cedar Spring*, 6 *Binney's R.*, 59). And in the case in the constitutional court of South Carolina, referred to in Cowen & Hill's Notes, Colcock, J., said: "It cannot be doubted at this day that the declarations of deceased persons, who shall appear to have been in a situation to possess the information, shall, on a question of boundary, be received in evidence" (*Spear v. Coate*, 3 *M'Cord's R.*, 229).

By the law of England, the rule is more restricted than in the United States. There, evidence of reputation to prove a boundary of *private* estates is not admissible, unless it be shown that the boundary of the two private estates is identical with that of two hamlets or parishes, in which latter case evidence of reputation may be put in, the same as though the boundary of the parishes or hamlets was the chief matter in issue (*Thomas v. Jenkins*, 6 *Adolph. & Ellis' R.*, 525; *Brisco v. Lomas*, 8 *ib.*, 213). The doctrine was thus stated by Lord Campbell: "The law of England lays down the rule that, on the trial of issues of fact before a jury, hearsay evidence is to be excluded, as the jury might often be misled by it; but it makes exceptions where a relaxation of

the rule tends to the due investigation of truth and the attainment of justice. One of these exceptions is where the question relates to matters of public or general interest. The term 'interest' here does not mean that which is 'interesting' from gratifying curiosity, or a love of information or amusement, but that in which a class of the community have a pecuniary interest, or some interest by which their legal rights or liabilities are affected. The admissibility of the declarations of deceased persons in such cases is sanctioned, because these rights and liabilities are generally of ancient and obscure origin, and may be acted upon only at distant intervals of time; because direct proof of their existence, therefore, ought not to be required; because in local matters, in which the community are interested, all persons living in the neighborhood are likely to be conversant; because common rights and liabilities being naturally talked of in public, what is dropped in conversation respecting them may be presumed to be true; because conflicting interests would lead to contradiction from others if statements were false; and thus a trustworthy reputation may arise from the concurrence of many parties unconnected with each other, who are all interested in investigating the subject. But the relaxation has not been, and ought not to be, extended to questions relating to matters of mere private interest; for respecting these direct proof may be given, and no trustworthy reputation is likely to arise. We must remark, however, that although a private interest should be involved with a matter of public interest, the reputation respecting rights and liabilities affecting classes of the community cannot be excluded, or this relaxation of the rule against the admission of hearsay evidence would often be found unavailing" (*Regina v. The Inhabitants of Bedfordshire*, 4 *Ellis & Blackburn's R.*, 535, 541). But, as before stated, by the American practice, the declarations of deceased persons, in qualified cases, are admitted in evidence, in questions relating to private as well as public boundaries. The general rule, however, would seem to be, both in this country and in England, that, in order to render such declarations admissible as evidence, they must have been made *ante litem motam*, or before the suit was commenced in which they are offered. And it is generally held, also, that such declarations will be rejected, if the witnesses are not proved to be dead at the time of the trial (*Buchanan v*

Moore, 10 *Sergeant & Rawle's R.*, 281; *Regina v. Milton*. 1 *Carrington & Kirwan's R.*, 58).*

CHAPTER XXV.

EVIDENCE IN BOUNDARY CASES—JUDGMENTS AND OTHER ADJUDICATIONS—POSSESSION AND ACTS OF OWNERSHIP.

THERE are some other species of evidence admissible in boundary cases, which may be properly noticed. Verdicts, decrees, judgments, and other adjudications upon matters of a public nature, are admissible in evidence, not precisely as reputation, but as the decisions of competent tribunals on the matters involved. Of course, where the precise boundary has been litigated and passed upon by a competent judicial tribunal, the question will be regarded as *res adjudicata* between the same parties and their privies. But in cases of boundary the rule extends to the admission of such adjudications when not between the same parties, or directly upon the boundary involved. Thus, in the English Court of King's Bench, where the question related to the boundary between the manors W. and O., and the plaintiff's case was that the boundary line between these two manors was the ridge of a mountain, from which the waters descended in opposite directions, it was held that he might show, in support of this, that the boundary between the adjoining manor I. and the said manor O.

* Professor Greenleaf, in his excellent treatise on the Law of Evidence, lays it down as settled, that evidence of reputation is received, in regard to the boundaries of parishes, manors and the like, which are of public interest, and generally of remote antiquity; but he expresses the opinion that, by the weight of authority and upon better reason, such evidence is inadmissible for the purpose of proving the boundary of a private estate, when such boundary is not identical with another of a public or *quasi* public nature (1 *Greenl. Ev.*, § 145). This is in accordance with the doctrine in England; but in the United States, traditionary evidence, in cases of boundary, is more frequently admitted than in England. And since the first edition of Mr. Greenleaf's work, in 1842, a considerable number of cases have been reported, in which it has been held that such evidence is receivable to prove the boundaries of land between individual proprietors; so that it may be considered at present, perhaps, the better opinion, that traditionary evidence is admissible in cases of boundary of a private as well as a public nature.

was the ridge of the same line of mountain from which the waters descended in opposite directions; and that he might prove this fact, by the finding of a jury summoned from the duchy of Lancaster for the purpose of determining the boundary between the manors I. and O., on the petition of former owners of I. and O., who had represented that that boundary was uncertain, and that suits were likely to grow between them. The character of this kind of evidence is thus described in the opinions. Littledale, J., said: "On a question of boundary, mere reputation is evidence. But I put this as a verdict, not as reputation. It is a trial by witnesses competent to speak to the fact. Now, reputation being evidence, the verdict must be evidence, as was said in *Reed v. Jackson* (1 *East.*, 355); and this, though the former proceeding was between different parties. It is not reputation; but it is as good evidence as reputation." And Patterson, J., said: "It is certainly difficult to say that a verdict can be received merely as evidence of reputation; for a jury are summoned from the body of the county at large, and are not themselves likely to know the matter. But that argument, if it were to prevail, would exclude all evidence of verdicts, for a jury do not find upon knowledge of their own; so that the verdict never could be reputation, nor quite analogous to it. Yet, where a matter has been before a jury, the verdict is generally given in evidence as a sort of reputation, if I may so term it" (*Brisco v. Lomax*, 8 *Adolph. & Ellis' R.*, 210). The case of *Reed v. Jackson*, referred to by Littledale, J., was not one involving a question of boundary, but of a public right of way; and Lord Kenyon expressed the opinion that *reputation* was evidence with respect to public rights claimed, as in that case, but not with respect to private rights. He asserted, however, that the record offered in the case was admissible evidence, though between other parties, as to the finding upon the right to the public footway, which was negatived. The defendants in both cases stood in the same relative situation.

But the same court declared that the principles laid down in these cases, with respect to the admissibility of verdicts, have no application to awards. The court observed: "An award is but the opinion of the arbitrator, formed, not upon his own knowledge, as declarations used by way of reputation commonly are, but upon the result of evidence laid before him, most probably in private, and formed also *post litem motam*, having none of the

qualities upon which evidence of reputation rests. It may be said that the verdict of a jury is equally defective in such qualities. Whether it be so or not, it is sufficient to say that the admissibility of a verdict as evidence of reputation is established by too many authorities to be now questioned; but that the principle of those authorities is not clear enough to embrace an award" (*Evans v. Rees*, 10 *Adolph. & Ellis R.*, 151).

In a case before the Irish courts, ancient patents and inquisitions were admitted as evidences of reputation to show the extent of a navigable river (*The Marquis of Donegal v. Lord Templemore*, 9 *Irish Com. Law R.*, 374; *In re Belfast Dock Act*, 1 *Irish R.*, 128).

In a case in the English Court of King's Bench, ancient leases were held to have been properly received as evidence of reputation in a question of parish boundary, and old books of account, containing evidence of payment of parish rates, were admitted (*Plaxton v. Dare*, 10 *Barn. & Cres. R.*, 17; *S. C.*, 5 *Man. & Ryl. R.*, 1). And in another late case, under a rate for the relief of the poor of the parish of T., made in 1858, the appellant was assessed as occupier of an estate in that parish called N. From the year 1698 down to the time the rate was made, N. had maintained its own poor, and had never been charged with the support of the poor of any other place. In 1858 the owner of a large estate in the parish of T. found among the title-deeds of that estate in his possession an agreement, dated 1698, purporting to be made between the then owner of N., on the one part, and several inhabitants of T., on behalf of the parish, on the other. This agreement recited that N. was a part of T.; and that it had been agreed that N. should maintain its own poor, and not be chargeable toward the poor-rate of the other part of the parish. It was held that this agreement was admissible in evidence as an ancient document relating to the interest of all the estates in T., and which might, therefore, naturally and reasonably be expected to be found among the title-deeds of a large estate in T., and so came from the proper custody; that it was decisive evidence to show that N. was a part of the parish of T.; and that it was also evidence of reputation as to the extent of the parish, being a declaration by the deceased owner of N. and the other inhabitants of T. to that effect (*Regina, respondent, v. Mytton, appellant*, 2 *Ellis & Ellis' R.*, 557). In another case, ancient orders of ses-

sions, containing statements respecting boundaries, were admitted as evidence of reputation (*Duke of Newcastle v. Broxtowe*, 4 *Barn. & Adolph. R.*, 273; *S. C.*, 1 *Nev. & Man. R.*, 507). But in one case in the English King's Bench, entries in parish books, which recorded that the perambulations had taken a particular line, were rejected because it was evidence of a particular fact, and not of general reputation (*Taylor v. Devey*, 7 *Adolph. & Ellis' R.*, 409). In another case, upon a question concerning a parish boundary, a book kept in the Chapter-house of Salisbury, purporting to contain copies of leases granted by the dean and chapter, and their confirmation of leases granted by the bishop or the prebendaries, was put in evidence. The book was open to the tenants of the manors belonging to the dean and chapter, and many of the leases stated the district to be in the parish. Tindal, Ch. J., thought the book to be in the nature of a public document, and therefore admissible as evidence of reputation respecting the parish boundary (*Coombs v. Coether*, 1 *Moody & Malkin's R.*, 398).

On an inquiry as to the true boundary between two parishes and counties, certain presentments of a manor court were offered in evidence, in one of which the boundary was set out. The presentment in question was in a mutilated state; but as the part torn off appeared not to have contained any matter connected with the subject of boundary, the Court of King's Bench of England held it to be admissible (*Evans v. Rees*, 10 *Adolph. & Ellis' R.*, 151).

Mr. Taylor, in his treatise on the Law of Evidence, as administered in England and Ireland, expresses a doubt as to how far maps, showing the boundaries of counties, towns, parishes or manors, are admissible in evidence (1 *Taylor on Ev.*, 558, 5th edition). But the rule, doubtless, is that such maps are admissible as evidence of reputation, provided they are found in proper custody, that is, "in a place in which and under the care of persons with whom such documents must naturally and reasonably be expected to be found" (*Bishop of Meath v. Marquis of Winchester*, 3 *Bingham's New Cases*, 200-202; *S. C.*, 10 *Bligh's R.*, 462-464). Mr. Greenleaf says that maps showing the boundaries of towns and parishes are admissible if it appear that they have been made by persons having adequate knowledge; and, further, that verdicts are also receivable as evidence of reputation in questions of public or general interest (1 *Greenl. Ev.*, § 139).

In a case in the English Court of Exchequer, a map was produced in order to show that a certain place was not in the county of Suffolk. On the face of the map were printed the following words: "A new map of the county of Suffolk, taken from an original map published by Mr. I. K., in 1736, who took an actual and accurate survey of the whole county, now republished (1766), with additions and corrections by I. and W. K., etc." The map, which appeared to be ancient, did not comprise the place in question. It was produced by a witness who had purchased it twelve or fourteen years before, in whose custody it had been ever since. Coleridge, J., in delivering the judgment of the court, said: "One question argued before us was whether this map came from the proper custody. In one sense it did; for it was produced by a gentleman who bought it twelve years ago. But the fact of its being in the custody of the party who had such lawful possession of it does not at all vouch for its authenticity, nor that it is what it professes to be. It is wholly unlike the case of a deed purporting to be a conveyance of land. If such a deed is found in the custody of the party who, if it were such conveyance, would have a right to it, and kept amongst his title-deeds, such custody tends to show that it is what it professes to be. But that argument does not apply here. The custody does not tend to show that the map was what it professes to be. * * * The persons who made the map do not appear to have been deputed to make it by any persons interested in the question, nor to have been in any way connected with the district, so as to make it probable that they had such knowledge. The grounds on which an ancient pedigree is received in evidence are, consequently, wanting in this case. * * * We think, therefore, that this map was inadmissible" (*Hammond v. Bradstreet*, 10 *Exch. R.*, 390; *vide, also, Pipe v. Fulcher*, 1 *Ellis & Ellis' R.*, 111; *Pollard v. Scott, Peake, N. P.*, 19). But where a map of a parish was offered in evidence, and it was proved by the surveyor who made it that thirty-four years before the trial he laid down the boundaries of the parish from the information of an old man, who went round and showed them to him, it was held that the map might have been received as evidence of reputation, though it was rejected in consequence of the old man's death not being proved (*Regina v. Milton*, 1 *Car. & Kirwan's R.*, 58).

Private maps and surveys, according to the English rule, are

not generally receivable in evidence, either for or against the parties making them (*Vide Phillips v. Hudson*, 2 *Law R.*, *Ch. App.*, 243; *Wilkinson v. Abbott*, 3 *Brown's P. C.*, 684; *S. C.*, 4 *Gwillim's R.*, 1585; *Wakeman v. West*, 7 *Car. & Payne's R.*, 479). But such documents may, under certain circumstances, be treated as admissions by persons in possession of estates as to the extent of their rights, and are then receivable in evidence in the same manner as other declarations against proprietary interest. And in all cases where a party conveys real estate, describing it by a map, the map is regarded as a part of the deed, and, of course, is evidence against the grantor. In an early English case, A. was seised of the manors of B. and C.; and during his seisin he caused a survey to be made of the manor of B., which was afterward conveyed to E. In a dispute between the lords of the manors of B. and C. about their boundaries, it was held that this survey might be given in evidence (*Bridgman v. Jennings*, 1 *Ld. Raymond's R.*, 734). And in a later case Patterson, J., said that the only case in which a map is receivable in evidence is where it is undisputed that, at the time the map was made, the whole property belonged to the person from whom both parties claim (*Doe d. Hughes v. Lakin*, 1 *Car. & Payne's R.*, 481). Indeed, a map annexed to a deed seems to stand on the same footing as the description contained in the deed itself. It was laid down, as a rule, in a case in Massachusetts, hereinbefore referred to, that, "where lines are laid down on a map or plan, and are referred to in a deed, the courses, distances, and other particulars appearing on such plan are to be as much regarded as the true description of the land conveyed, as they would be if expressly recited in the deed" (*Davis v. Rainsford*, 17 *Mass. R.*, 207, 211). And to the same effect is an English *nisi prius* case, wherein it was held that the map on the back of a lease was a part of the contract, and might, therefore, be given in evidence to show what was demised (*Wakeman v. West*, 7 *Car. & Payne's R.*, 480; and *vide Lyle v. Richards*, 1 *L. R.*, *E. & I. App.*, 222). An old map of lands was allowed in an English case, where it came along with the muniments of title, and agreed with boundaries, as adjusted in an ancient purchase (*Yates v. Harris*, *Gilbert on Ev.*, 70). Parol evidence is admissible to identify a plan, where reference is specifically made to it in a written agreement (*Hodges v. Horsfall*, 1 *Russ. & My. R.*, 116; *Chinan v. Cooke*, 1 *Sch. & Lef. R.*, 32).

Ancient surveys and extents, which are produced from proper custody, and which are proved to have been made under proper authority, are held to be receivable in evidence as public documents in questions of boundary. In the English Court of Exchequer, an ancient extent of crown lands, found in the office of land revenue records, and purporting to have been made by the steward of the crown lands, was held to be evidence of the title of the crown to the property which was mentioned therein, and which was stated to have been purchased by the crown of a subject (*Doe d. William IV v. Roberts*, 13 *Mees. & Welsb. R.*, 520; and *vide Earl of Carnarvon v. Villebois*, *Id.*, 313; *Furman v. Read*, 4 *Best & Smith's R.*, 174). But in a case in the Court of King's Bench, there was offered in evidence an instrument purporting to be a survey of a manor, which was at one time a parcel of the duchy of Lancaster. The document was produced from the office of the duchy, and was taken by J. W., the deputy of the surveyor-general of the duchy, by authority of letters of deputation to J. W., and by the oaths and presentments of the tenants of the manor, whose names were subscribed. There was also contained a description of the boundaries, custom and other particulars. No authority for taking the survey was proved, except as appears from this statement. It was held to be inadmissible on a question relating to the boundaries of the manor, inasmuch as it was not a survey authorized by the statute of *Extenta Manerii* (4 *Edward I, statute 1*); for this statute gives no power to define the boundaries of manors. And it was, moreover, held not even to be evidence of reputation; though some doubt as to the accuracy of the judgment on this last point is expressed in another case in the Exchequer (*Evans v. Taylor*, 7 *Adolph. & Ellis' R.*, 617; *vide Duke of Beaufort v. Smith*, 4 *Exch. R.*, 450).

In another case in the Court of Exchequer, it appeared that, in the reign of Charles I, the crown granted in fee form "a messuage, and escheat lands and tenements, containing by estimation 112 acres, situate in the vill of K., now or late in the occupation or tenure of D." In replevin of a distress for the rent reserved, which had been made in certain closes of a farm called Plas Bach, the defendant, for the purpose of proving that Plas Bach was parcel of the 112 acres out of which the rent issued, tendered in evidence a presentment of a grand jury, from the office of land revenue records, made in the eleventh year of the reign of Queen

Elizabeth, in which lands called Y Plas Baghe were mentioned as being in the township or vill of K., and in the occupation of D. No authority for the survey appeared, nor was the paper signed by the jury. It was held that although, for the purpose of furnishing evidence of reputation as to the boundary of the vill, the instrument might perhaps have been admissible, yet that, as it appeared to be no more than a survey taken by a private individual for his own purposes, it could not be received in evidence as a public document (*Daniel v. Wilkin*, 7 *Exch. R.*, 429).

Ancient extents and surveys, which come from the proper custody and appear upon examination to have been regularly and properly taken, may sometimes be admitted in evidence, although the commissions under which they were taken are lost (*Rowe v. Brenton*, 8 *Barn. & Cres. R.*, 747). But survey books of a manor, although ancient, cannot be received in evidence, unless signed by the tenants, or unless they appear to have been made at a court of survey; they are also only private memorials (12 *Viner's Abrid.*, A. b. 15, § 12). Under an issue to try the boundaries of a parish, papers handed over to the present incumbent by the representatives of his predecessor, as papers belonging to the parish found in the late incumbent's possession, were admitted in evidence, without calling upon the representatives themselves to account for the way in which the documents came into their hands; and in the same case a *terrier* of the parish, not signed by any person bearing any public character or office in the parish, was rejected (*Earl v. Lewis*, 4 *Espinasse's R.*, 1). Where a boundary line between a city and patent lands was in dispute, the Court of Appeals of the State of New York held that an ancient agreement as to the boundary between the trustees of the city and certain proprietors of lands in the patent, upon due proof of its execution and the appointment of the trustees, was competent evidence. It was also held that, on the same issue, field notes, made pursuant to the said agreement, and procured from the town records of the said city, were also admissible, and that the settlement deed between the said trustees and proprietors was competent. And it was further held that maps, surveys, deeds and leases found in records of the city and executed by the trustees were admissible, and that it was no objection that the *cestuis que trust* had not individually any power to resist, for that they might have elected other trustees (*Hunt v. Johnson*, 19 *N. Y. R.*, 279).

In the State of New Jersey it was held that, where the question is as to the actual location of a way, as a boundary, the proceedings of the surveyors of the way are admissible in evidence, without proving the appointment of the surveyors (*Haring v. Van Houten*, 2 N. J. R., 61).

The possession of real estate is *prima facie* evidence of the highest estate in the property, namely, a seisin in fee (*Hill v. Draper*, 10 Barb., 454). Upon this principle, a statement made by a person in possession of property that he holds only for life, or for any other estate less than the fee, is a declaration strongly against his interest. Such a statement, therefore, is receivable in evidence both against the declarant himself and those claiming under him; and, after his death, both for and against strangers, in order to show what estate the declarant held in the premises (*Buller's Nisi Prius*, 103).

The foregoing points have been settled by English authorities, the most of which are referred to by Mr. Hunt in his little work upon boundaries, as applicable to questions relating to the boundary of a parish or manor, and the like, but not as applicable to prove the boundary of private estates; as, by the law of England, such evidence is admissible only in cases where the boundary is one of public interest. But, inasmuch as the opinion is entertained that the tendency of the American decisions is to admit such evidence on questions of private as well as public boundaries, the cases considered are pertinent, and may be cited as authority upon all such questions in the American States.

Evidence of acts of ownership, exercised by a party on the neighboring property of the adjoining owner on the opposite side of a river, has been allowed, to rebut the presumption that each party's land extended to the *medium ad flum* of the bed of the stream. The case in which the evidence was allowed may be referred to at length, because the learned baron who gave the opinion makes many valuable observations on the points here discussed. The dispute between the parties in the case related to the ownership of a portion of the bed of a stream, flowing between the plaintiff's farm and the defendant's farm, its source being at some distance from both. The plaintiff contended that the whole of the bed of the river adjacent to his land belonged to him; the defendant, on the other hand, claimed it *ad medium flum aquæ*. The plaintiff's farm extended a greater distance down the stream

than the land of the defendant on the other side. Evidence was brought forward to show that lower down, and opposite another farm belonging to C., the plaintiff was the undisputed owner of the whole bed of the river. This evidence consisted of acts of ownership exercised by the plaintiff upon the bed of the river close to C.'s farm, and of repairs done by him to a fence which divided C.'s farm from the river, and which was a continuation of a fence on the defendant's land. A new trial having been moved for, on the ground of the improper rejection of this evidence, Baron Parke delivered the following judgment: "I am of opinion that this case ought to go down to a new trial, because I think the evidence offered of acts in another part of one continuous hedge, and in the whole bed of the river adjoining the plaintiff's land, was admissible in evidence, on the ground that they are such acts as might reasonably lead to the inference that the entire hedge and bed of the river, and consequently the part in dispute, belonged to the plaintiff. Ownership may be proved by proof of possession, and that can be shown only by acts of enjoyment of the property itself; but it is impossible, in the nature of things, to confine the evidence to the precise spot on which the alleged trespass may have been committed. Evidence may be given of acts done on other parts, provided there is such a common character of locality between these parts and the spot in question as would raise a reasonable inference in the minds of the jury that the place in dispute belonged to the plaintiff if the other parts did. In ordinary cases, to prove his title to a close, the claimant may give in evidence acts of ownership in any part of the same inclosure; for the ownership of one part causes a reasonable inference that the other belongs to the same person, though it by no means follows as a necessary consequence, for different persons may have balks of land in the same inclosure; but this is a fact to be submitted to the jury, and I apprehend the same rule is applicable to a wood which is not inclosed by any fence; if you prove the cutting of timber in one part, I take that to be evidence to go to a jury to prove a right in the whole wood, although there be no fence or distinct boundary surrounding the whole; and the case of *Stanley v. White* (14 *East*, 332), I conceive, is to be explained on this principle. In that case there was a continuous belt of trees, and acts of ownership on one part were held to be admissible to prove that the plaintiff was the owner of another

part, on which the trespass was committed. So I should apply the same reasoning to a continuous hedge; though no doubt the defendant might rebut the inference that the whole belonged to the same person by showing acts of ownership on his part along the same fence. It has been said, in the course of the argument, that the defendant had no interest to dispute acts of ownership not opposite his own land; but the ground on which such acts are admissible is not the acquiescence of any party; they are admissible of themselves, *proprio vigore*, for they tend to prove that he who does them is the owner of the soil; though, if they are done in the absence of all persons interested to dispute them, they are of less weight. That observation applies only to the effect of the evidence. Applying that reasoning to the present case, surely the plaintiff, who claims the whole bed of the river, is entitled to show the taking of stones, not only on the spot in question, but all along the bed of the river which he claims as being his property; and he has a right to have that submitted to the jury. What weight the jury might attach to it is another question. The principle is the same as that which is laid down in *Doe v. Kemp*" (*Jones v. Williams*, 2 *Meeson & Welsby's R.*, 326; and *vide The Marquis of Donegal v. Lord Templemore*, 9 *Irish Com. Law R.*, 374; *Duke of Devonshire v. Hodnett*, 1 *Hudson & Brooke's R.*, 322; *In re Belfast Dock*, 1 *Irish Eq. R.*, 142). In the case of *Doe v. Kemp* referred to by the learned baron, it was held that acts of ownership, exercised not only over the spot in dispute, but over other parts of the *waste lands of a manor*, are receivable in evidence in support of the lord's rights, if the parts in dispute and the parts over which the acts of ownership have been exercised are so situated that they may fairly be considered as parts of one waste or common (*Doe d. Barrett v. Kemp*, 2 *Brooke's New Cases*, 108; but *vide Simpson v. Dundy*, 8 *Com. Bench R., N. S.*, 433). It has been held that entries of presentments in the books of a manor are not evidence of ownership by the lord (*Irwin v. Simpson*, 7 *Brown's P. C.*, 317).

The foregoing rules of evidence would seem to be all that are distinctively applicable to cases where boundaries are the subject of litigation, and a more lengthened statement, therefore, need not be given, although some illustrations may be found in a subsequent chapter.

CHAPTER XXVI.

RULES RELATING TO TREES AND HEDGES ON THE BOUNDARIES OF PROPERTY — THE OWNERSHIP OF TREES WHOSE ROOTS EXTEND INTO, OR WHOSE BRANCHES OVERHANG, THE LAND OF THE ADJACENT PROPRIETOR — THE PROPERTY IN THE FRUIT OF SUCH OVERHANGING BRANCHES — REMEDIES IN SUCH CASES.

It may not be regarded as entirely inappropriate, in a work like the present, to notice the principles which are understood to apply to the owners of trees and hedges growing upon boundary lines, or so near that their roots extend into the land of the adjoining proprietors. Whether one proprietor of land can compel another, in the absence of special agreement, to submit to have his land burdened with the roots of a tree planted on the neighboring soil, does not seem to have been passed upon by the courts of England as often or as directly as by the courts of the United States. The necessity which exists for an easement being enjoyed, openly and as of right, before it can be acquired, may sufficiently account for the dearth of authority upon the question. It seems that the authorities of England, such as there are, are somewhat conflicting, or, at least, not entirely harmonious upon the subject. A sufficient number of the cases which have been reported in both countries will, therefore, be considered, in order to arrive at correct conclusions in respect to the principles on which the subject is governed.

In an early case, decided by the Court of King's Bench of England, it was ruled by Lord Holt, chief justice, that if A. plants a tree upon the *extremest limits* of his land, and the tree growing extends its roots into the land of B. next adjoining, A. and B. are tenants in common of this tree; but if all the roots grow into the land of A., though the boughs overshadow the land of B., yet the branches follow the roots, and the property of the whole is in A. (*Waterman v. Soper*, 1 *Ld. Raym. R.*, 377). And in an old case, reported by Rolle, it was held that if a tree grows in a hedge which divides the land of A. and B., and by the roots takes nourishment in the land of A. and also of B., they are tenants in common of the tree (*Anonymous*, 2 *Rolle's R.*, 255). Another case in England was tried at nisi prius, in which it appeared that the body of the tree was in the defendant's land, but some of the spur

roots grew into the land of the plaintiff. An action of trespass having been brought for cutting down the tree, Littledale, J., seems rather to have sanctioned the doctrine laid down in *Masters v. Pollie* (2 *Rolle. R.*, 141), and said that he did not see on what grounds the jury could find for either party, in respect to the question which had been raised as to the proportion of nourishment derived by the tree from the soil of the plaintiff and defendant; but that the safest criterion for them would be to consider whether, from the evidence given as to the situation of the trunk of the tree above the soil, and of the roots beneath it, they could ascertain where the tree was first sown or planted, and find for the plaintiff or defendant accordingly (*Holder v. Coates*, 1 *Moody & Malk. R.*, 112; *S. C.*, 22 *Eng. C. L. R.*, 265). These seem to be the only English cases directly upon the point; and, by the *nisi prius* case, the judge does not appear to have decided anything, except that the jury were to determine the ownership of the tree by finding out in whose land the body of the tree was situated. This view is in accordance with the doctrine of *Masters v. Pollie*.

The rule of the civil law on the subject of boundary trees is contained in the following passages: "If a tree strikes its roots into the neighboring soil, nevertheless it remains his in whose land it had its origin" (*Digest, Lib. 47, 7, 6, § 2*). "If a tree, planted near a boundary line, extends its roots into the lands of a neighbor, it becomes common" (*Institutes, Book 2, tit. 1, § 31; Digest, Lib. 41, 1, 7, § 13*). It appears from Potliet that the last cited passage is to be confined to the case of a tree planted on the very edge or boundary line of the property (*cited in Gale on Easements, 4th edition, 470*). The rule, therefore, of the civil law as to the ownership of boundary trees is in harmony with that which seems to prevail in England upon the same subject.

The French Code contains several provisions on the subject of trees and hedges. By article 671 it is not allowable to plant trees of lofty trunk, except at such distance from the boundary as is prescribed by particular regulations actually existing, or by constant and acknowledged usages; and, in default of regulations and usages, only at the distance of two metres from the line which separates the two estates, in the case of trees of lofty trunk, and at the distance of half a metre in the case of other trees and quick hedges. A neighbor may require trees and hedges planted at a less distance to be pulled up (*article 672*). And trees which are

found in a common hedge are common like the hedge; each of the two proprietors has a right to require that they should be felled, and also of cutting the roots of trees growing into his land (*article* 673). These provisions are certainly quite reasonable.

The rule in the American States upon the subject does not seem to vary much from that which is understood to prevail under the English law; that is to say, not from the rule adopted by Littleton, J., in the principal case of *Holden v. Coates*.

In an early case before the Supreme Court of Errors of the State of Connecticut it was held that a tree, whose trunk stands on the land of A., extending some of its branches over, and some of its roots into the land of B., is, with such overhanging branches, and the fruit thereon, the sole property of A.; and that if B. gather the fruit from such branches, and appropriate it to his own use, he is liable in trespass to A. Bissell, J., gave the opinion of the court in the case, and made the following observations: "The case of *Waterman v. Soper* supposes the tree to be *planted* on the 'extremest limit;' that is, on the *utmost point or verge* of A.'s land. Is it not, then, fairly inferable from the statement of the case that the tree, where grown, stood in the dividing line? And in the case cited from Rolfe the tree stood *in the hedge* dividing the land of the plaintiff from that of the defendant. Is it the doctrine of these cases that whenever a tree, growing upon the land of one man, whatever may be its distance from the line, extends any portion of its roots into the lands of another, they, therefore, become tenants in common of the tree? We think not; and if it were, we cannot assent to it. Because, in the first place, there would be insurmountable difficulties in reducing the principle to practice; and, in the next place, we think the weight of authorities is clearly the other way.

"How, it may be asked, is the principle to be reduced to practice? And here it should be remembered that nothing depends on the question whether the branches do or do not overhang the lands of the adjoining proprietor. All is made to depend solely on the inquiry whether any portion of the roots extend into his land. It is this fact alone which creates the tenancy in common; and how is the fact to be ascertained?

"Again; if such tenancy in common exists it is diffused over the whole tree. Each owns a certain portion of the whole. In

what proportion do the respective parties hold? And how are these proportions to be determined? How is it to be ascertained what part of its nourishment the tree derives from the soil of the adjoining proprietor? If one joint owner appropriates all the products, on what principle is the account to be settled between the parties?

"Again; suppose the line between adjoining proprietors to run through a forest or grove. Is a new rule of property to be introduced in regard to those trees growing so near the line as to extend some portions of their roots across it? How is a man to know whether he is the exclusive owner of trees growing indeed on his own land but near the line; and whether he can safely cut them without subjecting himself to an action?

"And again, on the principle claimed, a man may be the exclusive owner of a tree one year, and the next a tenant in common with another; and the proportion in which he owns may be varying from year to year, as the tree progresses in its growth.

"It is not seen how these consequences are to be obviated, if the principle contended for be once admitted. We think they are such as to furnish the most conclusive objections to the adoption of it" (*Lyman v. Hale*, 11 Conn. R., 177, 182).

To the same effect is a late decision of the Supreme Court of the State of Vermont, in a case wherein it was held that a tree, which has its main body or trunk in A.'s land, and extends part of its branches and roots into the land of B., is the sole property of A., and that B. would be liable in trespass on the freehold for picking, carrying away and converting to his own use the fruit growing on the branches overhanging his own land (*Skinner v. Wilder*, 38 Vt. R., 115). And precisely the same doctrine is held by the courts of the State of New York. The subject was very thoroughly examined and elaborately discussed by the Court of Appeals of the State, a few years since, and a conclusion was reached in accordance with this rule. Allen, J., delivered the opinion of the court, and said: "Different opinions have been held as to the rights of the owners of adjoining estates in trees planted, and the bodies of which are wholly upon one, while the roots extend and grow into the other; some holding that, in such cases, the tree, by reason of the nourishment derived from both estates, becomes the joint property of the owners of such estates, * * * while others, with better reasons, as it seems to me, hold"

that the tree is wholly the property of him upon whose land the trunk stands" (*Dubois v. Beaver*, 25 *N. Y. R.*, 123, 126; and *vide Hoffman v. Armstrong*, 46 *Barb. R.*, 337). The American authorities seem, also, to be uniform in holding that a tree, standing directly upon the line between adjoining owners, so that the line passes through it, is the common property of both parties, whether marked or not; and that trespass will lie if one cuts and destroys it without the consent of the other. This was held by the Supreme Court of the State of New Hampshire in 1845 (*Griffin v. Bixby*, 12 *N. H. R.*, 454); and precisely the same doctrine was laid down in a late case, decided by the Supreme Court of the State of New York, in which Welles, J., in delivering the opinion of the court, said: "It seems to be well settled that, where a tree or wall is in the division between two adjacent owners of land, they are owned by the opposite proprietors of the land as tenants in common, in the absence of any agreement to the contrary" (*Hoffman v. Armstrong*, 46 *Barb. R.*, 337, 339).

But in a previous case in the same court, while the liability of the owners of a tree upon the boundary line, in case of its destruction by one of the proprietors, is recognized to its utmost extent, the doctrine was held by the judge who gave the opinion that the owners of the tree were not *tenants in common*, and, hence, that an action of trespass, under the statute, might be maintained by one adjoining proprietor of lands against another to recover treble damages for cutting trees standing on the line between the lands of the parties; that is to say, the value of such proportion of the trees as was on the land of the former. Hogeboom, J., delivered the opinion of the court, and went into a learned and technical argument to show that the owners of a line tree are not *tenants in common* of the trees; but, on the contrary, that the portion that grows on the land of each must belong separately to him, and not partly to him and partly to his neighbor. And the learned judge concluded as follows: "I apprehend a line tree in many cases cannot be cut and destroyed: 1. Because it is a line tree, and, therefore, necessary to be preserved as a natural monument. 2. Because the cutting or destruction of one part will or may result in the destruction of the other part. The act seems a totally unnecessary and wanton one; and, if it be so in fact, is justly punished by treble damages; and I have no doubt, in a proper and sufficiently

important case, may be restrained by injunction" (*Relyea v. Bacon*, 34 *Barb. R.*, 547, 552).

The case was taken to the Court of Appeals of the State, where the judgment of the Supreme Court was affirmed; but it would seem that the higher court were of the opinion that, where a boundary line divides the trunk of a tree, it belongs to the adjoining proprietors as *tenants in common*. Allen, J., who delivered the opinion of the court, said: "It is not necessary to determine whether the parties were technically tenants in common of the trees growing upon the boundary line separating their respective farms, with all the ordinary rights and incidents of such an estate. The trees thus growing are called, in the case, 'line trees.' By this, I understand, is meant, not trees marked and set apart by the parties as evidences or monuments of the division line, but trees deriving their nourishment from roots extending on both sides of the line, and with bodies so directly over the line, and necessarily on both sides of that line, that it could not be determined upon which side of the line the tree was originally planted.

* * * If a tree grows in a hedge that divides the land of A. and B., and by its roots takes nourishment in the land of both, they are tenants in common. * * * Ordinarily, trespass will not lie by one tenant in common against his co-tenant; but where one tenant in common ousts his co-tenant, ejectment will lie at the suit of the latter; and where one tenant in common destroys the subject of the tenancy, trespass will lie at the suit of the injured party. * * * Here there was a total destruction of the trees, and the plaintiff had his remedy by action for the wrong done. If the parties were not tenants in common, the defendant was clearly a trespasser in cutting and carrying off that portion which belonged to the plaintiff—in reality as being upon his land" (*Dubois v. Beaver*, 25 *N. Y. R.*, 123, 126-128). It seems to have been agreed between the judges of the Supreme Court and the Court of Appeals, as to the rights and liabilities of the parties in the case, although they may have differed as to the technical principles on which those rights and liabilities should be placed. It may be important, however, in some cases, to have the question decided, whether the objects standing upon the boundary line between adjacent owners are owned by the parties as tenants in common or otherwise. The essence of a tenancy in common is a joint interest in each and every part of the property; and it is

understood that this principle does not apply to artificial objects placed upon the line by the hand of man, such as a wall, a fence, a house, or a building of any description; but there are reasons which might enter into the rule in respect to such objects, which would not be equally pertinent in regard to natural objects. And in regard to *timber trees*, for example, standing upon the line, it might be inconvenient for the parties to avail themselves of their property, unless they were regarded as tenants in common. One of the parties might desire his proportion of the timber of the trees, while the other prefers that the trees should remain standing, and will not consent to their severance. If the parties are tenants in common, in such a case the remedy is clear; a partition or sale of the trees may be ordered. If they are not so regarded the remedy may not be so clear. It may be suggested, therefore, that in case of *timber trees* and the like, standing upon the line, it may be more *convenient*, at least, to hold that the parties are tenants in common of such objects. Where the objects on the line are wantonly severed or destroyed by one of the parties, the other owner has his remedy, whichever rule applies. But where the line objects are destroyed by outside trespassers, or one only of the proprietors wishes to withdraw his interest in the property, the difference in the rule may be important.

It seems to be agreed, both by the laws of this country and of England, that trees whose trunks stand wholly upon the land of one owner belong exclusively to him, although the roots grow into and their branches overhang the land of another. But how shall the owner avail himself of the benefit of these overhanging branches or protruding roots, or of the branches or fruit which, perchance, may fall upon the adjoining property? The question of the title to the property is well settled; but can the owner avail himself of it without subjecting himself to an action on the part of the adjoining owner?

It is laid down in Viner's Abridgment that if trees growing in a hedge hang over another man's land, and the fruit of them falls into the other's land, the owner of the fruit may go in and retake it, if he makes no longer stay than is convenient, nor breaks the hedge (*Vin. Abr., tit. Trespass, l. a., and Trees, E.; and vide Millen v. Faudye, Popham's R., 163*). The same rule has been held to apply where trees are blown down by the wind, or fall over by any other unavoidable accident (*Viner's Abr., Trespass,*

II. a. 2, and note; and vide Dyke v. Dunstan, 6 *Edw.*, 4, *fol.* 7, *pl.* 18, cited in *Smith v. Kenrick*, 7 *Com. Bench R.*, 515, 563). The owner, however, in such cases, cannot, without special circumstances to justify it, make such an entry without previous request to the occupier upon whose land the fruit or trees had fallen. Should the latter, after such request, refuse to deliver up the property, or to answer the owner's demand, a conversion might be presumed, and the owner of the goods might thereupon enter and take his property, subject to any damage he might commit, or bring his action for the conversion of the property, and recover its value (*Anthoney v. Haney*, 8 *Bingham's R.*, 186; *S. C.*, *Ib.*, 193). This doctrine is upon the same principle which obtains in the case where a person places the goods of another on his own close, in which case he gives the owner of them an implied license to enter for the purpose of recaption (*Patrick v. Colerich*, 3 *Mees. & Welsb. R.*, 485). By the civil law, the proprietor upon whose land fruit had fallen from trees belonging to an adjoining proprietor was obliged to permit it to be gathered; and this right might have been enforced against him by the interdict *de glande legendâ* (*Colquhoun's Summary*, § 993).

The American doctrine upon the subject is the same as upon the other side of the Atlantic. A case substantially in point was decided by the Supreme Court of the State of New York, in 1866, and hereinbefore referred to upon another branch of the subject. The action was for an assault and battery. The defendant and one Dr. Hoffman, the brother of the plaintiff and with whom she resided, were the owners of adjoining lots. A cherry tree stood upon the land of Dr. Hoffman, with limbs overhanging the land of the defendant. The plaintiff undertook to pick the cherries from the limbs of the tree which overhung the defendant's land. The defendant forbade her doing so; and she still persisting, the defendant attempted to prevent her, by force, and she was somewhat injured. The jury found a verdict in favor of the plaintiff for \$1,000, on which judgment was entered, and the defendant appealed to the General Term, where the judgment was affirmed, and the following proposition, among others, was laid down by the court: "If the owner of land overhung by the branches of a tree growing upon the adjacent lot, attempts by violence to prevent the owner of the adjacent lot from picking the fruit on the overhanging branches, he is a wrong-doer, and an

action for an assault and battery may be maintained against him" (*Hoffman v. Armstrong*, 46 Barb. R., 337).

But, although such is the law, it does not follow that the owner is obliged to have his land burdened by the overhanging branches of the trees of his neighbor; because, if they prove to be a nuisance, he has his action for the damages, and that the same be abated (*Vide Hoffman v. Armstrong, supra; Aiken v. Ketchum*, 39 Barb. R., 400). Whatever unlawfully annoys or does damage to another is a nuisance, and such nuisance may be abated, that is, taken away or removed by the party aggrieved thereby, so long as he commits no riot in the doing of it (*Perry v. Fitzhove*, 8 Queen's Bench R., 776; *Jones v. Jones*, 1 Hurlstone & Coltman's R., 1; 3 Black. Com., 6). If the boughs of one adjoining proprietor grow out into the land of another, this is held to be a private nuisance, and they may be cut down; but they cannot be cut down before they grow over for fear they should eventually become a nuisance (*Norris v. Baker*, 1 Rolle's R., 394; *Viner's Abr., Trees, E.*). The same rule has been supposed to be applicable to roots encroaching upon the neighboring soil, although the author has found no case in which the doctrine has been decided (*Vide Gale on Easements, 4th ed.*, 467).

If the occupier of land suffer his trees so to protrude over the highway as to inconvenience passers by, this is held to be a common nuisance, and the trees may be lopped sufficiently to avoid the evil by any person having occasion to pass that way, for any one may justify the removal of a common nuisance (*Earl of Lonsdale v. Nelson*, 2 Barn. & Cres. R., 311). And the reason why the law allows this private and summary method of doing one's self justice, is because injuries of this kind, which obstruct or annoy such things as are of daily convenience and use, require an immediate remedy, and cannot wait for the slow progress of the ordinary forms of justice (3 Black. Com., 6). It has been held in England, however, that this principle has no application where a fence belonging to a railway company obstructs a thoroughfare; in such a case the public have no right to prostrate it; but a mandamus must be applied for, or some other remedy sought (*Ellis v. London and South-Western Railway Company*, 2 Hurlstone & Norman's R., 424; *Wyatt v. Great Western Railway*, 6 Best & Smith's R., 709). But the rule will doubtless apply to the case of overhanging branches of trees, and the like, which cause a sub-

stantial damage to the owner of the lands encroached upon. It has been held by the English courts in one case at nisi prius, wherein it appeared that a Virginian creeper extended itself over the house of the defendant, whereupon he cut it and cleared it from his house, that the defendant had a right to abate it, as a nuisance. This was admitted, and the only question which was contested, was whether the defendant had used greater force and violence, and had done greater damage than was necessary (*Pickering v. Budd*, 1 *Starkie's R.*, 56; *vide Houghton v. Butler*, 4 *Term. R.*, 364; *Roberts v. Rose*, 3 *Hurl. & Colt. R.*, 162; *S. C.*, 4 *ib.*, 103). Of course, in abating a nuisance arising from overhanging branches, care must be taken to cut off only so much as actually overhangs the land of the party injured, or the person abating the nuisance may subject himself to heavy damages (*Vide Trahern's Case*, *Godbolt's R.*, 233; *Bather's and Simpson's Case*, 9 *Coke's R.*, 53; *Rex v. Pappineau*, 2 *Strange's R.*, 686; *Cooper v. Marshall*, 1 *Burrow's R.*, 268).

A man may justify entering the land of another to abate a nuisance, but before entry it is always advisable to give notice to the other proprietor, in order that he may have an opportunity of removing the obstruction himself before another intrudes on his land (*Davies v. Williams*, 16 *Queen's Bench R.*, 556). Said Best, J., in giving the opinion in a case decided by the English Court of King's Bench: "Nuisances by an act of commission are committed in defiance of those whom such nuisances injure, and the injured party may abate them without notice to the person who committed them; but there is no decided case which sanctions the abatement, by an individual, of nuisances from omission, except that of cutting the branches of trees which overhang a public road, or the private property of the person who cuts them. The permitting these branches to extend so far beyond the soil of the owner of the trees, is a most unequivocal act of negligence, which distinguishes this case from most of the other cases that have occurred. The security of lives and property may sometimes require so speedy a remedy as not to allow time to call on the person on whose property the mischief has arisen to remedy it. In such cases an individual would be justified in abating a nuisance from omission without notice" (*Earl of Lonsdale v. Nelson*, 2 *Barn. & Cres. R.*, 311; and *vide Jones v. Williams*, 11 *Mees. & Welsb. R.*, 181). But it is always prudent to give notice before

proceeding to abate the nuisance by force of hand. It has been held by the English courts that it is always necessary to give a notice to the mere continuer of a nuisance before the party aggrieved can take the law into his own hands (*Vide Penruldock's Case*, 5 *Coke's R.*, 100, 101; *Winsmore v. Greenbank*, *Wille's R.*, 583; *Salmon v. Beuesley*, 1 *Ryan & Moody's R.*, 189; *Jones v. Williams*, 11 *Mees. & Welsb. R.*, 176, 181). In all cases of private nuisance, the party injured may proceed by action to have it abated (*Winterbottom v. Lord Derby*, 2 *L. R., Exch.*, 316; *Pickett v. Metropolitan Railway Company*, 5 *Best & Smith's R.*, 156).

By the French Code, he whose property is overshadowed by the branches of his neighbor's trees may compel the latter to cut off such branches. If it be the roots which encroach on his estate, he has a right to cut them therein himself (*Code Napoleon*, art. 672).

By the Roman law, if a tree on a boundary line injured the property of another in a town, the owner of the tree might be required to cut it down altogether; but if the property were in the country, he could only be required to trim the branches fifteen feet up from the ground, and no higher, whatever the inconvenience might be to his neighbor. If the party complained against refused to remove or lop the tree, the interdict *de arboribus cædendis* lay against him at the instance of the other party, who might appropriate the wood to himself (*Colquhoun's Summary*, §§ 993, 2305).

CHAPTER XXVII.

THE LAW RELATING TO THE BOUNDARIES OF PARISHES — SOME POINTS OF INTEREST RESPECTING BOUNDARIES NOT HEREINBEFORE DISTINCTIVELY NOTED — THE POINTS PROMISCUOUSLY STATED.

It will be convenient, especially in some portions of this country, that some general observations be made in respect to the law relating to the boundaries of parishes. According to Sir William Blackstone, "the division of the country into parishes probably took place not all at once, but by degrees. For it seems pretty clear and certain that the boundaries of parishes were originally

ascertained by those of a manor or manors; since it very seldom happens that a manor extends itself over more parishes than one, though there are often many manors in one parish. The lords, as Christianity spread itself, began to build churches upon their own demesnes or wastes to accommodate their tenants in one or two adjoining lordships; and, in order to have divine service regularly performed therein, obliged all their tenants to appropriate their tithes to the maintenance of the one officiating minister, instead of leaving them at liberty to distribute them among the clergy of the diocese in general; and this tract of land, the tithes whereof were so appropriated, formed a distinct parish, which will well enough account for the frequent intermixture of parishes with one another. For if a lord had a parcel of land detached from the main of his estate, but not sufficient to form a parish of itself, it was natural for him to endow his newly erected church with the tithes of those disjointed lands; especially if no church was then built in any lordship adjoining to those outlying parcels" (1 *Black. Com.*, 113, 114). And it was declared in the Court of Exchequer of England, in a case decided some forty years ago, that "the boundaries of parishes were settled long after the foundation of churches; and those ecclesiastical districts, formerly belonging to parishes at their first institution, have been since much varied, and in many cases abridged and narrowed, when new churches were built" (*Lonsley v. Hayward*, 1 *Younge & Jervis' R.*, 586).

It seems that a district may belong to one parish for ecclesiastical purposes, and be joined to another parish or township for civil purposes. In a late case before the English Court of Queen's Bench it appeared that the district of Tranly lay adjacent to the two parishes of Hessele and Kirk Ella, in Yorkshire, which were both immemorial parishes, each having a church. For a hundred years and more the lands of Tranly had been rated to the poor and highway rates of Hessele, and the overseers and surveyors of Hessele had always acted for Tranly as if it were part of their district. But the lands in Tranly from the earliest period had been tithable to Kirk Ella as if they were situate in that parish; and as to all ecclesiastical matters Tranly had uniformly and immemorially been treated and reputed as part of the parish of Kirk Ella. Tranly having been rated to the relief of the poor of the parish of Hessele appealed against the rate, which was, however, confirmed by the Court of Queen's Bench, on a special case stated for

their opinion, on the ground that a usage which had existed so long ought to be supported, unless it could be clearly shown that it could not have had a legal origin; and because there was no rule of law which prevented Tranly from belonging to one parish for civil and to another for ecclesiastical purposes (*Regina v. Watson*, 9 *Best & Smith's R.*, 219; *S. C.*, 3 *L. R.*, *Q. B.*, 762).

Every town in the State of Massachusetts is considered to be a parish until a separate parish is formed within it; and then the inhabitants and territory not included in this separate parish constitute the first parish (*Brunswick v. Dunning*, 7 *Mass. R.*, 445). The erecting of a poll-parish, under the Massachusetts statute of 1786, chapter 10, has this effect as much as the erecting of a parish circumscribed by one continuous line, and in which all the lands shall join and be continuous to each other (*Minot v. Curtis*, 7 *Mass. R.*, 441). And, when incorporated, such poll-parish is considered as "set off" from the town (*Sutton v. Cole*, 8 *Mass. R.*, 96).

Parishioners may justify going over any man's land in their perambulations according to their usage, and may abate all nuisances in their way (*Goodday v. Michell*, *Cro. Eliz.*, 441; *S. C.*, *Owen's R.*, 71). But a custom for the inhabitants of a parish to enter a particular house, which is neither upon the boundary line nor in any manner wanted in the course of the perambulations, cannot be supported (*Taylor v. Davey*, 7 *Adolph. & Ellis' R.*, 409, 416; *vide Ipswich Docks v. St. Peter's*, 7 *Best & Smith's R.*, 310, 346).

If a parish extends to a tidal river, it cannot be assumed, in the absence of evidence, to extend beyond the line of ordinary high-water mark (*Bridgewater Trustees v. Bootle-cum-Linacre*, *Law R.*, 22, *B.* 4). But it has been hereinbefore shown that where the lands of two proprietors are separated by a road or private stream, the line dividing the properties is presumed, in default of evidence to the contrary, to coincide with the *medium filum* of the road or stream; and a like presumption exists where two parishes are separated by a highway or an unnavigable river. In a case in the English Exchequer Chamber it appeared that the statute 30 Car. II had carved the parish of St. Anne, Soho, out of the parish of St. Martin's-in-the-Fields, and it described the northern boundary of the former parish thus: "With all the houses and grounds abutting on and upon the said road (Oxford street)

leading from the sign of the Red Cow to the sign of the Crooked Billet." By 2 Will. and M., chap. 8, all streets in London and Westminster were to be paved at the costs of the householders in such streets, each paving to the middle of the street in front of his house. By 10 Geo. III, chap. 23, section 10, such portion of Oxford street as lay in certain parishes, of which St. Anne's was one, was declared to be within the parish of St. Marylebone, with reference to paving, lighting and cleansing. From the year 1771 to the year 1855 rates were made under this last statute upon the occupiers of the houses on the south side of Oxford street towards the paving of the street by the parish of St. Marylebone, which was coterminous with the parish of St. Martin's-in-the-Fields on the north. It appeared that for the last thirty years the parishioners of St. Marylebone had perambulated the boundaries of their parish to the middle of the road in Oxford street; while, on the other hand, the parishioners of St. Anne, Soho, had perambulated their parish only to the pavement on the south side. An old map, dated 1771, in the possession of the parish of St. Marylebone, shows the boundary line to be drawn along the center of Oxford street. On the 6th of May, 1857, the board of works made an order under section 140 of 18 and 19 Vict., chap. 120, by which the whole of Oxford street was placed under the management of the vestry of St. Marylebone for the purpose of paving, etc. The vestry, having put in repair the whole of the said street, made an order upon the Strand district of the board of works, which includes the parish of St. Anne, Soho, for their share of the expenses, and in consequence of the refusal of the board to pay the same a mandamus issued against them. The point having come before the Court of Queen's Bench on a special case stated for their opinion, Cockburn, Ch. J., made the following remarks: "The question is whether the words used in the act include that portion of the street which is between the houses and the *medium filum* of the street. It is said, on the part of the defendants, that they do not; because, if it had been intended that the parish should extend to the *medium filum*, those words would have been introduced, or the boundary of that part of the parish would have been described, as 'the said road.' It is clear that to put this construction on the act of Charles II would lead to great inconvenience; and I see nothing in the words which should lead us to adopt it. In conveyances and acts of Parliament upon

which questions of law have arisen, where land was conveyed or a district constituted with specific boundaries, and one of them consisted of a highway or a river, we never find it described as the *medium filum* of the highway or river; and it is clear, especially since the case of *Berridge v. Ward* (10 C. B., N. S., 400), that if language like the present had appeared in an ordinary conveyance it would have been considered as including the land *ad medium filum viæ*. Then why should we put a different construction upon this act of Parliament? * * * Besides, we ought to give some effect to the legal presumption which arises here. Before the passing of the act of 30 Car. II, the parishes of St. Martin's-in-the-Fields and St. Marylebone were coterminous, divided by a great highway, now known as Oxford street, and the ordinary presumption of law would be that the highway which divided the parishes was divided *ad medium filum* between them. That being so, and there being no evidence to controvert that presumption, if we held that language of the statute made the parish of St. Anne extend only to the front of the walls of the houses on the south side of Oxford street, it would follow that, the highway between St. Martin's-in-the-Fields and St. Marylebone having been formerly divided between those two parishes, all that part of Oxford street which now lies between the *medium filum viæ* and the frontage of the houses in the parish of St. Anne would still be in the parish of St. Martin. The Legislature could never have intended anything so monstrous" (*Regina v. The Board of Works for the Strand District*, 4 Best & Smith's R., 551).

Where two parishes are separated by a private river, and there is no positive evidence of the boundary line between them, it is to be presumed to coincide with the middle line of the channel (*Vide Bridgewater Trustees v. Bootle*, 7 Best & Smith's R., 4; S. C., 2 L. R., Q. B., 348; *McCannon v. Sinclair*, 2 Ellis & Ellis' R., 53). And it has been before shown that the shores of the sea and the beds of public rivers are *prima facie* extra-parochial, but that such presumption may be rebutted by evidence (*Regina v. Musson*, 8 Ellis & Blackburn's R., 900).

There are still some other points of more or less interest which have been settled by the courts in respect to the law of boundaries, and which did not seem to fall under any head of the subject as ordinarily treated, and these points will be briefly digested in the remainder of this chapter.

Where a ditch formed the boundary between the lands of the plaintiff and those of one P., and an obstruction had been placed therein by the plaintiff, with the consent of P., in order to prevent sand from being carried down and choking a ditch of his own, the courts of North Carolina held that trespass was not the proper form of action to redress an injury (the choking of the plaintiff's ditch) caused by the defendant removing so much of such obstruction as was upon P.'s half of the boundary ditch; the latter having consented to such removal (*Hogwood v. Edwards*, 1 *Phill. L. R.*, 350).

The owners of a tract of land, about the boundaries of which there was no dispute, were agreed that one of them was entitled to 150 acres, to be taken off the southern part of the tract by a line to be run parallel with the southern boundary of the tract. A surveyor, who was employed by the owners to run the line separating the 150 acre piece from the remainder of the land, made a mistake, by which less than 150 acres was included in the southern division. The Supreme Court, before whom the case came for adjudication, held that the survey was not conclusive upon the parties. And the further proposition was declared, that an owner of land who points out his boundary to a person about to purchase adjoining land, is not thereby estopped from claiming beyond such boundary when his representations were not acted upon by the purchaser (*Russell's Adm'r. v. Maloney*, 39 *Vt. R.*, 579). But a proprietor who points out to a settler on land adjoining his own, a line as the true boundary, acquiescing and assisting him in a settlement and improvements thereon, is thereby estopped from afterward asserting claim to the land covered by the improvements, though a subsequent survey proved it to be his own land (*Jordan v. Deaton*, 23 *Ark. R.*, 704). However, where parties agree upon a division line between their land, under a mistake, and occupy each his own part respectively, they are not thereby estopped from asserting any other line, provided the rights of innocent third parties have not intervened (*Knowlton v. Smith*, 36 *Mo. R.*, 507; and *vide Liverpool Wharf v. Prescott*, 7 *Allen's R.*, 494).

In an action of ejectment, where the question was as to the proper location of a warrant, and there was proof of an admitted corner of an adjoining survey, which the surveyor under the first had adopted, protracting a line from it and giving the course and

distance thereof in his return some sixty years before the date of the competing warrant and survey; the Supreme Court of Pennsylvania held, that it was error to instruct the jury, that before they could adopt the line from that corner, they must be satisfied that there were marks on the ground corresponding with the date of survey. It was observed that such instruction would be fatal to every chamber survey on record. And it was further declared that any of the marks of an older survey might be appealed to in fixing the location of a younger one, and that it was the duty of surveyors under younger warrants to adopt such ancient landmarks rather than establish new ones (*Dreer v. Carskudden*, 48 Penn. R., 38; and *vide Bellas v. Cleaver*, 40 *ib.*, 260). And where a surveyor sought to correct and enlarge a survey, which he had made with plainly marked lines and established courses, by simply running out one line from a corner of the tract, establishing no corner there, but calling for that distance in his field notes, and said notes called for the bearing trees at the corners established in the original survey; the Supreme Court of Texas held, that the true boundary line was that found in the original survey, and that there was in fact no correction of the survey at all. And it was further held that the marked lines and corners of a survey control where they vary from the calls as to distance (*Bartlett v. Hubert*, 21 Texas R., 8).

In an action before the Supreme Court of California, to recover damages for trespass in working across the boundary line of the plaintiff's mining claim, it appeared that the plaintiff had told the defendant that he need not be uneasy, for he had fifty feet to run before he would reach the line. The court held this not to amount to a license to the defendant to work on the plaintiff's land, nor to an estoppel to the latter from recovering the damages he had actually sustained. It was held that the defendant was guilty of negligence in not ascertaining the boundary, as he could have done so by a survey (*Maye v. Tappan*, 23 Cal. R., 306). And the Supreme Judicial Court of Massachusetts has held, that, a written instrument executed by the proprietors of adjoining lands, reciting that they were desirous of having their respective lines run so that each might know his true boundary, and agreeing to employ a surveyor to run the lines and put up stakes or marks to designate each lot, and to pay the expense proportionally, is not an agreement in the nature of a submission to arbitration, so

as to make the lines run by him conclusive upon the parties to it, and it was further held that, if lines have been run by a surveyor at the common expense of owners of adjoining lands, and boundary marks set up, and one party adopts a line thus run, and builds in conformity with it, the other party is not thereby estopped from claiming that it is not the true line, if it does not appear that he knew that the other was incurring expense upon the faith of a supposed agreement to treat the line thus run as the true one (*Thayer v. Bacon*, 3 *Allen's R.*, 163). But the Supreme Court of New Hampshire, on the contrary, has held that an agreement between owners of adjoining lands, that the line between them shall be ascertained and settled by a surveyor, is, when executed, conclusive upon them and all claiming under them; and not, as in some jurisdictions, merely strong evidence of the line. And it was further held, that possession up to a line, run by a surveyor in the presence and by direction of the parties, long continued, without question, is evidence from which a jury may infer an agreement of the parties, that the line so run should be conclusive (*Dudley v. Elkins*, 39 *N. H. R.*, 78).

Where the divisional fence between the lands of A. and B. was a stone wall, three feet wide, set wholly on the land of A.; and B. had, for more than fifteen years, held exclusive possession of his own land up to the wall, treating the center of the wall as the dividing line, and believing it to be so, but with no knowledge of such claim on the part of A., and no other possession of the ground covered by the wall; the Supreme Court of Errors of Connecticut held it was a sufficient adverse possession to vest in B. a title to the center of the wall (*Huntington v. Whaley*, 29 *Conn. R.*, 391). But in a contest of boundary between two parties who have purchased adjoining tracts from a common vendor, the line which their vendor had caused to be run as the dividing line between the two tracts before he sold them, will be recognized as the dividing line between the two parties deriving title from him. Under such circumstances, if either party has not the quantity of land called for by his title, he must seek it from his vendor, and not from the proprietor of the adjoining tract, who does not claim or possess beyond the line established by their common vendor. And it was held that, in such a case the plat or survey and *proces verbal* of a parish surveyor are admissible in evidence after the death of the surveyor to show that the line was run by him at the

request of the common vendor, and that he considered it the boundary of the two tracts which had been divided by him, and also to show that the parties bought the land in accordance with the lines established by the survey, and that the defendant took possession and cultivated his tract according to it. And the rule was declared, that in an action of boundary, a division line which has long been established by surveyor's marks, a canal and fence, and under which both parties bought, and which is referred to in the act of sale, will be taken as the true line in preference to a new one which gives to one of the parties a larger boundary (*Lebeau v. Bergeron*, 14 *La. An. R.*, 489).

The Supreme Court of New Hampshire has held that it is not improper for a witness to state that, among other indications of the existence of an established line, he noticed a ridge of land apparently marking the interval between the occupation for tillage or other purposes, on the one side and the other; what such ridge indicates, being almost as much a matter of fact and observation on the ground as its existence (*Hall v. Davis*, 36 *N. H. R.*, 569). And the Supreme Court of Texas has held that the acquiescence of the proprietors of the adjoining lands, in a particular line, is not unfrequently referred to and received as evidence to determine their boundaries; and that prior possession is notice of the claim of the person in possession to the purchaser of adjoining lands. And it was further declared that what are boundaries is matter of law; but where they are, is a matter of fact (*Bolton v. Lann*, 16 *Texas R.*, 96). But a division line, mistakenly located and agreed on by adjoining proprietors, will not be held binding and conclusive on them if no injustice would be done by disregarding it (*Menkens v. Blumenthal*, 27 *Miss. R.*, 198; *Gray v. Couvillon*, 12 *La. An. R.*, 730). However, it has been held by the Supreme Court of Vermont that proof that parties, expressly recognizing a particular line, agreed to build the fence as near as might be convenient, will establish the line which the parties had in view, and which the general direction of the fence indicates (*Clark v. Taber*, 28 *Vt. R.*, 222).

To establish a conventional boundary line, different from that apparently indicated by a prior deed, it must appear that both the parties to the convention had a good title, or subsequent parties are not bound. So held by the Supreme Court of Tennessee (*Rogers v. White*, 1 *Sneed's R.*, 68). And the Supreme Court of

Indiana has held that, to support an implied agreement, with reference to a boundary differing from that expressed in title-deeds, an acquiescence of at least twenty years (the statutory period) is requisite (*Ball v. Cox*, 7 *Ind. R.*, 458). Though, as a general rule, "an admission by a party of a mistaken line for the true one has no legal effect upon his title," still, a mutual recognition of a given line by adjoining proprietors, accompanied by actual possession of one or both for the period of fifteen years, in Vermont, will be conclusive as to their respective rights (*Spaulding v. Warren*, 25 *Vt. R.*, 316; and *vide Brown v. Edson*, 23 *ib.*, 425; *Cunningham v. Roberson*, 1 *Swan's R.*, 138). And the Supreme Court of Missouri has held, that where the owners of contiguous lots agree upon a dividing line between lots, and use and occupy the respective lots up to this line for a length of time sufficient to show their understanding and intention—though much less than twenty years—neither of them, nor those claiming under them, can afterward set up a different common boundary. And it was declared that the statute of frauds did not interfere in such a case (*Blair v. Smith*, 16 *Mo. R.*, 273). And the same court held, in a subsequent case, that it was not necessary to prove boundaries by a plat of survey or field notes, but that they might be proved by a witness who is acquainted with the corners and old lines, though he never saw the land surveyed (*Weaver v. Robinet*, 17 *Mo. R.*, 459).

Where a specified tract of land is sold for a gross sum, the boundaries of the tract control the description of the quantity it contains; and neither party can have a remedy against the other for an excess or deficiency in the quantity, unless such excess or deficiency is so great as to furnish evidence of fraud or misrepresentation. But this rule does not apply to a case where the mistake is in the boundaries of the tract sold, and not in the quantity of acres it contains, nor where the deficiency is not in the thing described, but in the ability of the party to convey the same (*Voorhees v. De Meyer*, 2 *Barb. R.*, 37).

A parol agreement respecting a boundary, made while a party is only an accupant without title, cannot be binding upon him after he acquires the fee (*Crowell v. Maughs*, 2 *Gilman's R.*, 419). But the compromise of a doubtful right is a sufficient consideration to establish the boundary line between conflicting titles; and although, in making such compromise, the parties act in good

faith, but in mutual mistake of the law, it will bind them (*McCoy v. Hutchinson*, 8 *Watts & Serg. R.*, 66). So, where the original boundaries of private possessions have been destroyed, or are unknown, or not well ascertained, a survey made by the owner, in reasonable conformity with the calls of his title-deed or papers, is held to be an ascertainment of the very land owned by him, and to conclude him on principles of public policy, and for the security and repose of others. But whether the reason of the doctrine applies to *femes covert, quære*. If the parties know where the true line is, and by agreement make another, this would be a parol transfer of the land, and would be void by the statute of frauds (*Yorborough v. Abernathy*, 1 *Meigs' R.*, 413).

It is no objection to the location of a grant that the quantity is ascertained to be more than four times the amount stated in the grant, or that the lines are prolonged greatly beyond the distances, or that course is sometimes disregarded (*Fulwood v. Graham*, 1 *Richardson's R.*, 491). And a grantee of lands may claim all included within the deed, as designated by monuments, courses and distances, although the premises are described as containing 200 acres, strict measure, and no more (*Jackson v. McConnell*, 19 *Wend. R.*, 175). So, if a vendor hold two tracts adjoining, and sell a certain quantity by metes and bounds, though the deed call for one tract, yet if the metes and bounds run into the other the purchaser will hold according to the metes and bounds (*Wallace v. Maxwell*, 1 *J. J. Marshall's R.*, 447). A conveyance by metes and bounds will carry all the land included within them, although it be more or less than is stated in the deed (*Belden v. Seymour*, 8 *Conn. R.*, 19; *Pernam v. Wood*, 6 *Mass. R.*, 131; *Jackson v. Ives*, 9 *Cow. R.*, 661; *Mundell v. Perry*, 2 *Gill & Johns. R.* 206; *Jackson v. Sprague*, 1 *Paine's R.*, 494).

The proprietors of adjacent lands are tenants in common of the boundary line; and a fence erected on the line is a fixture, in which they have an undivided interest, and for the removal of which neither can maintain trespass against the other (*Gibson v. Vaughn*, 2 *Bailey's R.*, 389). This is the rule, unless there exist some statute to change it; and where statutes do exist, they will be referred to in the subsequent part of this work, treating upon the law relating to fences. And here the consideration of the special subject of boundaries is concluded.

The Law of Boundaries, Fences and
Window Lights.

PART II.

OF THE LAW OF FENCES.

CHAPTER XXVIII.

WHAT CONSTITUTES A FENCE — NO OBLIGATION AT COMMON LAW TO MAINTAIN FENCES — HOW THE SUBJECT IS REGULATED — SOME POINTS RELATING TO THE OBLIGATION TO REPAIR FENCES.

FENCES are sometimes referred to as boundaries for the division of property, but they are more properly treated in law as guards against intrusion, and a fence is usually understood to be a line of obstacle interposed between two portions of land, for the purpose of preventing cattle or other domestic animals from going astray, or for protecting a field or property from unlawful encroachment. A fence may consist of almost any kind of inclosure or division; but a hedge, ditch, bank, wall or frame of wood will be most commonly found to answer the term.

At the common law, no man is bound to fence his lands against the cattle of another, but by that law the owner of the beasts is bound to restrain them, and is answerable for any trespass which they may commit upon the lands of another. In other words, at common law the owner of cattle must fence them in — the neighbor is not bound to fence them out. And by the general rule it is immaterial whether the trespassing cattle come in from the highway, the land of the owner of the beasts, or through the land of a third person. It is said in an old English authority, that every man ought to keep up his own hedges (2 *Roll.*, 289); but it is not thereby intended that every man is bound to raise any visible or material defense against the adjoining proprietor. He may, if he please, leave his property open, and separated from the land of the neighboring owner, by nothing but the ideal invisible boundary which exists in contemplation of law which bounds every man's land, and is his fence (*Star v. Rokesby*, 1 *Salkeld's R.*, 335). This is the common-law rule. The word "close" is technical, and signifies the interest in the soil, and not a close or inclosure in the common acceptation of the term.

But as every man is bound not to trespass upon the land of another, so is he bound to keep his beasts from trespassing also, "for if by his negligent keeping they stray upon the land of

another (and much more if he permits or drives them on), and they then tread down his neighbor's herbage, and spoil his corn or his trees, this is a trespass, for which the owner must answer in damages, and the law gives the party injured a double remedy in this case, by permitting him to distrain the cattle thus damage feasant, or doing damage, till the owner shall make him satisfaction, or else by leaving him to the common remedy by action" (3 *Black. Com.*, 211). It is perfectly well settled and understood that by the common law no man was bound to fence against the cattle of others. The owner of cattle was bound at his peril to restrain them from trespassing upon the lands of his neighbor, and, if he neglected to do so, he was not only precluded from recovering damages for any injury which the cattle might sustain by going upon the lands of others, but he was himself liable to make compensation for the trespass committed by his cattle (*Rust v. Low*, 6 *Mass. R.*, 94; *Thayer v. Arnold*, 4 *Met. R.*, 589; *Little v. Lathrop*, 5 *Greenl. R.*, 356; *Bush v. Brainard*, 1 *Cow. R.*, 78; *Holladay v. Marsh*, 3 *Wend. R.*, 142). In the case of *Rust v. Low*, Chief Justice Parsons laid down the rule: "At common law, the tenant of a close was not obliged to fence against an adjoining close, unless by force of prescription; but he was at his peril to keep his cattle on his own close, and to prevent them from escaping; and if they escaped, they might be taken on whatever land they might be found *damage feasant*, or the owner was liable to an action of trespass by the party injured." And this rule of the common law applied as well to division fences as to those upon the public highway. Where there was no agreement or prescription, there was no mode by which one tenant could compel the tenant of an adjoining close to make division fences; and even where there was an agreement or prescription, the remedy was by action upon such agreement or prescription. It was said by a very ancient English author, that if a man seised of 200 acres enfeoff another of fifty acres, the feoffor is bound to inclose them and keep his cattle within the fifty acres, and so is the lord of the residue (*Dyer's Rep.*, 372). There can be no doubt, however, that neither would be bound to inclose for the benefit of the other; it is certainly the duty of every owner to prevent his cattle from trespassing on the land of his neighbor, but the courts of England have repeatedly held that no one can be bound to maintain a fence between his own land and the land

adjoining except by agreement or prescription (*Vide Fitzherbert's Natura Brevium*, 128, note; *Churchill v. Evans*, 1 *Taunton's R.*, 529). Said, Bayley, J., in a leading case in the English Court of King's Bench: "The right to have a fence repaired by the adjoining proprietor is in the nature of a grant of a distinct easement affecting the land of the grantor" (*Boyle v. Tamlyn*, 6 *Barn. & Cres. R.*, 329, 339). And it is said by an elementary writer of England, that "there may be a spurious kind of easement obliging an owner of land to keep his fences in a state of repair, not only sufficiently to restrain his own cattle within bounds, but also those of his neighbor" (*Gale on Easements*, 4th ed., 460; and *vide Star v. Rokesby*, 1 *Salkeld's R.*, 335).

It is very clear, therefore, that the obligation to maintain a fence is founded upon a statute, agreement or prescription. In the American States the erection and repair of boundary and division fences is generally regulated by statute; and most of the questions which have arisen here upon the subject have arisen under the various statutes which have been enacted in respect to it. The statutory policy of the several States will be referred to and fully explained in subsequent chapters. It may be affirmed here, however, that it is perfectly competent for the Legislatures of the several States to pass laws regulating the subject of boundary and division fences, whatever may be said as to the constitutional right to require the maintaining of fences along public highways (*Vide Wills v. Walters*, 5 *Bush's R.*, 351). It may be further stated as a rule that, inasmuch as the common law does not require parties to maintain fences, statutes regulating the subject are remedial, and intended to provide against existing defects in the common law; and they must, therefore, receive a liberal or comprehensive construction, both as to the extent of the change and the means of carrying them into effect, as a strict or close construction of a remedial statute is less likely to correspond with the probable intention of the Legislature where the language of the statute is such as to leave the actual intention in relation to the particular case a matter of doubt. So in those cases, where the statute creates a new right for the party, if the statute should fail to prescribe a remedy for the party aggrieved by the violation of such statutory right, courts, upon the principle of a liberal or comprehensive interpretation of the statute, will presume that it was the intention of the Legislature to give to the party aggrieved a

remedy by a common-law action for the violation of his statutory right; and he will be permitted to recover in an appropriate action founded upon the statute. But where the statute, creating this new right, prescribes the remedy for a violation of that right, the party aggrieved by such violation of the right must pursue the remedy given to him by the statute and cannot resort to any other. These principles are elementary and need not be fortified by quotation of authorities; but it is often necessary to apply them to cases arising under statutes relating to the erection and repairing of fences.

Independent of any statute, parties may obligate themselves by contract to maintain boundary and division fences; but in order that the agreement be binding it must ordinarily be in writing, and have the effect of a grant (*Hewlins v. Shippam*, 5 *Barn. & Cres. R.*, 221). And in the absence of actual proof of an agreement, it has been held that the right to have fences repaired must be founded upon an adverse enjoyment for the time limited by the statute, from which a grant will be presumed (*Vide* 1 *Kent's Com.*, 583; *Fitzherbert, N. B.*, 127, 128, *in notis*). A covenant to maintain a partition fence between the land granted and other land of the grantor runs with the land, and binds the covenantor, his heirs and assigns (*Potter v. Parry*, 7 *Weekly Reporter*, 182; *Western v. McDermott*, 2 *Law Rev., Ch. App.*, 72; *S. C.*, 1 *Law Rev., Eq.*, 499). And it has been held by the Supreme Court of the State of New York that a covenant to keep up a partition fence, which imposes a different liability from that provided by the statute relating to "division fences," is a covenant running with the land, and an incumbrance, within the meaning of a covenant to convey free of all incumbrances. And it was also held, in the same case, that where the owner of land agrees with a railroad company to build and forever maintain good and sufficient fences on both sides of a railroad through said land, and releases the road from all claim for damages in consequence of its neglect in not having said fences built previous to that date, such is a covenant which runs with the land, and is within the covenant to convey free from all incumbrances (*Blain v. Taylor*, 19 *Abb. Pr. R.*, 228; and *vide* *Bronson v. Coffin*, 108 *Mass. R.*, 175; also 2 *Hilliard's Real Property*, 392).

Reference has been made to the presumption arising from the enjoyment of repairs to a boundary fence. In the case of rights

of way and most other easements, the original enjoyment cannot be accounted for unless a grant has been made; and therefore it is that, from long enjoyments, such grants are presumed. But in the case of the enjoyment of repairs made to a boundary fence by the adjoining owner the case is different; for the original enjoyment was consistent with the fact of there having been no grant, and with the repairs having been made by the party charged for his own benefit, and in pursuance of the obligation which the law imposes upon every man to keep his cattle from trespassing on his neighbor's property (*Doe dem. Fenwick v. Reed*, 5 *Barn. & Ald., R.*, 232, 237).

It is well settled, however, that an obligation to maintain a partition fence may exist by prescription. This is to be inferred from some authorities already referred to; but the doctrine has been frequently affirmatively held. In an early case before the Supreme Judicial Court of Massachusetts the defendant was sued for damage done by his cattle escaping through a defective line fence; it was held that the owner of the cattle doing damage in such case might show that the party complaining was bound by prescription to maintain the fence, and that he might prove it by ancient usage, although it was held that the prescription should be pleaded (*Rust v. Low*, 6 *Mass. R.*, 90). And in a later case, before the same court, it was declared that, where a party is not bound by *prescription*, agreement, or assignment of fence-viewers, to maintain a fence between his land and that of the adjoining owner, he may sustain an action of trespass, *quare clausum fregit*, against the adjoining owner, whose cattle escape into his land. And it was said that the common law in this respect was not altered by the statutes of the commonwealth (*Thayer v. Arnold*, 4 *Met. R.*, 589).

At an early day in the State of South Carolina it appeared that the plaintiff had erected a partition fence on the line dividing his land from that of an adjoining owner, after requesting the said proprietor to join in the building thereof, which he refused to do, in the city of Charleston; and afterward, on the refusal of the owner of the same land adjoining to pay any part of the expense thereof, brought assumpsit for a contribution, or a moiety of the expense, and gave in evidence a local custom of the place, entitling the builder of a party wall or fence to recover half the expense of erecting the same, and had a verdict. On appeal, the court above

held that the custom was a good one, and affirmed the verdict (*Walker v. Chichester*, 2 *Brevard's R.*, 67).

The Supreme Court of Alabama, a few years since, declared that, by the common law, a tenant of a close is not bound to fence against an adjoining close, unless by force of *prescription*; and that, where no prescription or agreement exists, the legal obligation of the tenants of adjoining lands to make and maintain partition fences depends entirely upon statutory provisions (*Moore v. Levert*, 24 *Ala. R.*, 310). And to the same effect is a decision of the highest court of Maryland, by which it was held that, in a county where there is no act of the legislature regulating partition fences, the principles of the common law will prevail, and that the tenant of a close is not obliged to fence against an adjoining close, unless by force of prescription, but he is bound at his peril to keep his cattle on his own close (*Richardson v. Miller*, 11 *Md. R.*, 340).

Prescription to fence is allowed at common law, as resulting from an original grant or agreement, the evidence of which is lost by lapse of time; or the obligation by prescription may arise from a usage of the tenants of adjoining closes, and those who have held the same closes before them, to repair certain proportions thereof, respectively, for a time whereof the memory of man runneth not to the contrary. It was declared by Parsons, Ch. J., in the decision of a case in the Supreme Judicial Court of Massachusetts, over sixty years ago, that this country had *then* "been settled long enough to allow of the time necessary to prove a prescription, and ancient assignments by fence-viewers, made under the late provincial laws; and also ancient agreements made by the parties may have once existed, and be now lost by the lapse of time" (*Rust v. Low*, 6 *Mass. R.*, 90, 97).

If one of two proprietors of adjoining lands maintains a fence for the benefit in whole or in part of the adjoining proprietor, for a period of time sufficient to establish a prescription, the law will presume a grant or covenant by which he became legally obliged to do so. But, notwithstanding the rule that the obligation to maintain certain portions of a line fence may be established by prescription, this obligation continues no longer than while they are coterminous possessors; and if there be a change in extent by which one of the adjoining proprietors borders on the other, the fence-viewers may be called upon to settle the proportion of fence

to be built by each owner (*Adams v. Van Alstyne*, 35 *Barb. R.*, 9; *S. C. affirmed*, 25 *N. Y. R.*, 232).

The obligation to maintain a fence by an agreement and that by force of a prescription are entirely cognate or of the same nature. Indeed, prescription, as recognized in law, is a title or right acquired by possession; so that the right of a party to have a portion of the division fence between himself and his neighbor maintained by the adjoining owner, by *prescription*, is predicated upon the fact, so to speak, that he has *enjoyed* the benefit of such fence for a period requisite to ripen an adverse possession of any easement into a title. It is the general rule of law that he who has been for a long time in possession of a thing shall be regarded as the owner of it, because men are naturally careful not to give up what belongs to them, or long continue to do that which is a burden to them unless they are under some legal obligation to do it. On this principle the right to enjoy the repairs of a boundary fence by prescription is predicated, although the period which matures this right is different in different States. The doctrine, however, is recognized in all of the American States, and in England.

The general rule then is that, at the common law, a party is not, from the mere circumstance of having a neighbor, compelled to raise any defense against the contiguous property. He may continue to preserve the "ideal, invisible boundary," which the law recognizes as separating the close of one man from that of another, without any visible or tangible fence. A man is only bound to take care that his cattle do not wander from his own land and trespass upon the lands of others.

But the inconvenient consequences of this exposure give at once the reason why fences are of value, and the right to create and keep them in repair comes in question as soon as the mischief, whether it be by the intrusion of cattle or otherwise, has occurred. Because the law, notwithstanding the general rule that a party shall not be held to fence his land for the benefit of another, interferes immediately upon the accession of the injury, and accords a remedy according to the event. Thus it became the interest of men, in the first instance, to guard against mutual encroachment and incursion, and this was effected through the medium of a fenced boundary. In view of the rule stated and the consequences of a strict adherence to it, it might be supposed that the

advantages of a fence are so mutual, there would be found a double defense at the verge of each inclosure. This, however, so far from being the case universally, where only the common law prevails, is even very rare, the boundaries of property being usually confined within one defense. And it may be added, as a general rule, that the repair of the defense ensues upon the ownership thereof. But this condition of things must be attributed to agreement between the respective parties. And agreement is either developed by deed, or presumed where no deed exists. In the one case, the instrument sufficiently manifests the intention of the parties; in the other (and the majority of instances is of this nature), the obligation to fence, in the absence of statutory enactment, arises by prescription. The right to repair fences has sometimes been the subject of litigation where there has existed an express covenant, but it has been more especially so where the liability has rested upon prescription.

But property of adjoining closes may become severed, and again, after the disunion, they may be once more centered in the same owner. In the first case, where no inclosure exists, it has been debated whether the seller or the buyer should maintain the fence, in the absence, of course, of an express stipulation upon the subject. If there be an inclosure already, unless there be an agreement to the contrary, in case of hedges, the person on whose side the hedge is, and the ditch is not, is under obligation to repair. In the second case, where the closes have returned to the same owner, and they are once more divided, it has been considered that the usual principle of extinguishment upon unity of possession governs the transaction; and, moreover, that the consideration does not revive after the severance. This was so decided in England hundreds of years ago (*Polus v. Henstock*, 1 *Ventris' R.*, 97); and the English Court of King's Bench has reiterated the doctrine within the last fifty years, in a case hereinbefore referred to, in which Bayley, J., said: "Even where adjoining lands, which have once belonged to different persons, one of whom was bound to repair the fences between the two, afterwards became the property of the same person, the pre-existing obligation to repair the fences is destroyed by the unity of ownership. And where the person who has so become the owner of the entirety afterwards parts with one of the two closes, the obligation to repair the fences will not revive, unless express words be intro-

duced into the deed of conveyance for that purpose" (*Boyle v. Tamlyn*, 6 *Barn. & Cres. R.*, 329, 337).

A man is not bound to fence against his own land; and if one bound to fence against the land of another purchase that land, he is not bound to maintain the fences any longer. So, if A. be bound to inclose against B., who has twenty acres adjoining, and A. purchases one acre contiguously adjacent to the inclosure, A. will not be compelled to inclose against that one acre. It follows, therefore, that the duty of fencing becomes extinguished by unity of ownership; and, further, that this duty is incapable of revivor in the event of the two closes again becoming vested in different owners; for though things of necessity shall revive, as a way to market or church, yet in the case of easements not of necessity the rule is otherwise (*Polus v. Henstock*, 1 *Ventris' R.*, 97). But it must be noticed that unity of possession suspends merely the obligation to repair the fence between two properties; to destroy the prescription there must be unity of ownership; and, further, the party must have an equally perdurable estate in both the tenements (*Canham v. Fisk*, 2 *Crompton & Jervis' R.*, 126).

Alderson, J., observed, in a case before the English Court of Exchequer: "If I am seised of freehold premises, and possessed of leasehold premises adjoining, and there has formerly been an easement enjoyed by the occupiers of the one as against the occupiers of the other, while the premises are in my hands the easement is necessarily suspended; but it is not extinguished, because there is no unity of seisin; and if I part with the premises the right, not being extinguished, will revive" (*Thomas v. Thomas*, 2 *Crompt., Meeson & Roscoe's R.*, 41). And in an early case before the English Court of King's Bench it appeared that King Henry VIII was seised of the tenements in Hermitage in fee simple absolute *jure coronæ*; that the occupiers of those lands had a prescriptive right to pasture beasts on Hermitage common, which was part of the duchy of Cornwall; and that, for want of a Duke of Cornwall, Hermitage common came into the possession of Henry VIII, so that he held the lands of Hermitage and Hermitage common together; it having been contended that the right of common was extinct by unity of ownership. Holt, Ch. J., said that this was not such a unity of ownership as would destroy the prescription; "for, though King Henry VIII had an estate in fee in the lands to which the common of pasture appertained, and also in

Hermitage common, yet he had not as perdurable an estate in one as he had in the other; for the quality of the estates differed, because Hermitage common was part of the duchy of Cornwall, and the king had in it only a fee determinable on the birth of a Duke of Cornwall, which is a lease fee; but in the tenements in Hermitage he had a pure fee simple and interminable, and, therefore, a unity of such estates worked no extinguishment; for where a unity of ownership extinguishes a prescriptive right, the two estates must be equal in duration, quality and all other circumstances of right" (*Rex v. The Inhabitants of Hermitage, Carthew's R.*, 239, 241).

These observations as to the suspension and revivor of prescriptive rights from mere unity of possession, without unity of seisin, apply only where the prescriptive right has already been gained. If the period allowed by the law for gaining the prescriptive right is not completed when the unity of possession occurs, it will be necessary to commence reckoning the prescription afresh when the unity of possession is ended, for while it lasted the boundary fences could not have been maintained by the occupier by virtue of any legal obligation; for it has been shown that no man is bound to fence one part of his property from another (*Vide Clayton v. Corby*, 2 *Gale & Davidson's R.*, 174).

It would seem, therefore, to follow as a natural consequence, if an obligation to maintain fences is destroyed by unity of ownership, and will not revive unless express words are introduced into the conveyance, that no agreement as to fencing can be implied on the part of either an ordinary vendor or vendee, upon a sale and division of lands between the owners and occupiers of which no obligation to repair fences has ever existed; and some of the cases herein considered substantially hold to this doctrine. But the obligation to erect and repair fences in this country more generally rests upon statutory regulation, and the principal litigation here arises under the various legislative enactments relating to the subject; and this policy will be particularly considered in subsequent chapters, where some of the points here stated will be further illustrated.

CHAPTER XXIX.

RULES IN RESPECT TO THE ERECTION OF FENCES — THE OWNERSHIP OF FENCES AND OTHER INCIDENTS — CONSEQUENCE OF THE NEGLECT TO KEEP FENCES IN REPAIR — WHO MAY TAKE ADVANTAGE OF A DEFECTIVE FENCE.

IN the absence of any agreement, statute or prescription, a person is obliged to erect his fence upon his own premises, in case he desires to inclose them. The rule respecting ditching laid down by Lawrence, J., in an early English case, clearly settles the law upon the subject. The learned judge said: "The rule is this: No man making a ditch can cut into his neighbor's soil, but usually he cuts it to the very extremity of his own land; he is, of course, bound to throw the soil which he digs out upon his own land, and often, if he likes, he plants a hedge on the top of it; therefore, if he afterward cuts beyond the edge of the ditch, which is the extremity of his land, he cuts into his neighbor's land, and is a trespasser. No rule about four feet, and eight feet, has anything to do with it. He may cut the ditch as much wider as he will, if he enlarges it into his own land" (*Vowles v. Miller*, 3 *Taunt. R.*, 138). Care must be taken, however, by the person making the ditch, that he does not dig so deep, nor in such a manner, as to let down his neighbor's soil, otherwise he will be liable to the party aggrieved for the damages which he may sustain by reason thereof (*Wyatt v. Harrison*, 3 *Barn. & Adolph. R.*, 871). Proof of the ancient width of the ditch is held to be evidence that the boundary line does not extend beyond the outer edge thereof; consequently, where two estates are separated by a hedge and single ditch, the presumption is, in default of evidence to the contrary, that both ditch and hedge belong to the owner of the land on which the hedge is planted (*Vowles v. Miller*, *supra*; *Strang v. Stewart*, 4 *Sess. Cases, H. of Lords*, 5). If there are two ditches, one on each side of an old hedge, or if a bank be raised on both sides of a trench, or if there be an old bank without any apparent trench on either side, then the ownership of the hedge, ditch or bank may be ascertained by proving acts of ownership; and consequently, proof of the exercise of ownership, such as cleansing the ditch, clipping the hedge, or

repairing the bank, is *prima facie* evidence of the property in the hedge, ditch or bank, as the case may be, being in the party exercising such acts. If the proprietors on each side of the boundary can prove acts of ownership, this would be evidence of a tenancy in common in the hedge, ditch or bank; unless it was positively shown what quantity of land each proprietor had contributed towards the formation of the ditch or bank dividing the properties; in which case the original boundary would not be disturbed, but each proprietor would continue to hold his share in severalty (*Vide Gray v. West*, 2 *Selwyn's N. P.*, 1297; *Searby v. Tottenham Railway Company*, 5 *L. R. Eq.*, 409; *Warne v. Southworth*, 6 *Conn. R.*, 471; *Woolrych on Fences*, 283). Holroyd, J., in a case decided by the English Court of King's Bench, said: "Generally speaking, where an inclosure is made, the party making it erects his bank and digs his ditch on his own ground, on the outside of the bank. The land which constitutes the ditch, in point of law, is part of the close, though it be on the outside of the bank. And if something further is done for the party's own convenience, when that which constitutes the fence is dug out from his land, as, for instance, if a small portion of uninclosed land near a public or private way is left out of the inclosure to protect and secure the occupation of that part of the land which is inclosed, that, in point of law, is a part of the close on which the inclosure is made" (*Doe v. Pearsey*, 7 *Barn. & Cres., R.*, 307; *vide Noye v. Reed*, 1 *Man. & Ryl. R.*, 65).

The principles which apply in cases of party walls, are also adopted in cases of fences of other materials. It is well settled by authority, that the property in a party wall erected at the joint expense of two proprietors ensues the property of the land on which it stands, where the quantity of the land contributed by each party is known. There is no transfer of property, but the parties are severally owners of their respective lands as before; and each, for any injury done to the portion of the wall standing on his own soil, has the ordinary remedy (*Matts v. Hawkins*, 5 *Taunt. R.*, 20). But where it is not known under what circumstances the wall was built, the presumption is that it belongs to the two proprietors as tenants in common. Said Bayley, J., in an early case in the English Court of King's Bench: "Where the builder of two houses grants off one, it is more reasonable to presume that he grants the whole wall in undivided moieties, than

that he should leave to either party the power of cutting the wall in half. That would be the case if the houses were built by one and the same person. If two persons built at the same time, the probability is that they would take a conveyance of an undivided moiety of the ground on which the wall was to be erected, in order that the property might afterward be kept in the same state" *Wiltshire v. Sidford*, 1 *Man. & Ryl. R.*, 403; *S. C.*, 8 *Barn. & Cres. R.*, 259; *Hutchinson v. Mains*, 1 *Alcock & Napier's R.*, 155).

It has been before stated that ownership of a hedge, bank or wall may be proved by acts of ownership; and, therefore, common user of a wall by two proprietors is *prima facie* evidence of its being their common property (*Corbitt v. Porter*, 8 *Barn. & Cres. R.*, 257). If a wall is not common property, but one-half of it belongs exclusively to one proprietor, and the other half of it exclusively to another, either proprietor is justified in pulling down the portion of the wall standing on his own land, although sufficient support may not be left for the portion which belongs to his neighbor (*Wigford v. Gill*, *Cro. Eliz.*, 269; *Wiltshire v. Sidford*, *supra*). It was expressly held in the Irish common-law courts, that a custom in the city of Dublin, that a person taking down a house for the purpose of rebuilding is bound to close up and protect the party walls of an adjoining house, was unreasonable and void (*Kempston v. Butler*, 12 *Irish C. L. R.*, 516).

In cases where there are circumstances from which a grant of an easement conferring a right of support may be implied, the party would not be justified in pulling down his own wall, provided the act undermines the adjoining foundations. The mere circumstance that two walls are in juxtaposition, however, will not give the right of support, nor will this circumstance render it necessary that a person pulling down one wall should give notice of his intention to do so to the owner of the adjoining wall (*Trower v. Chadwick*, 8 *Scott's R.*, 1; *S. C.*, 6 *B. N. C.*, 1). There must be special circumstances giving the right of support, as for instance where two walls are so built that one cannot stand without the support of the other, and both have been at one time in the hands of the same owner; the legal presumption in this case being that, when the owner granted away the house to which either of the walls is attached, he reserved to himself a right of support for his own house adjoining, and therefore conferred on his grantee a

similar right for the house granted to him, as an easement of necessity (*Vide Richards v. Rose*, 9 *Exch. R.*, 218; *Brown v. Windsor*, 1 *Crompt. & Jerv. R.*, 20; *Peyton v. Mayor of London*, 9 *Barn. & Cres. R.*, 725; *Massey v. Goyder*, 4 *Car. & Payne's R.*, 161; *Menchin v. Black*, 19 *Com. Bench R., N. S.*, 190; *Suffield v. Brown*, 10 *Jur., N. S.*, 114; *S. C.*, 33 *L. J. Ch.*, 249; *Pyer v. Carter*, 1 *Hurls. & Nor. R.*, 916). Doubts have been expressed whether a right of support can be gained for one house from another by mere lapse of time, because there is great difficulty in implying a grant of an easement in cases where its enjoyment has not been open and as of right (*Vide Brown v. Windsor, supra*). This difficulty is not altogether got rid of by the fact that the house for which support is claimed has been visibly out of the perpendicular for many years, because the amount of support required can be only matter of conjecture. In a late case before the English Court of Exchequer, the houses of the plaintiff and defendant were separated by a house belonging to a third person. The three houses adjoined one another, and had all been visibly out of the perpendicular for upward of thirty years. There was no evidence as to the manner in which the leaning originated, and it did not appear that there had ever been any connection between the houses, either with respect to title, possession or occupation. The defendant in pulling down his house caused the adjoining house to sink, and the plaintiff's house, having lost its support, fell down. In an action brought to recover damages for the injury, it was held that, as the houses of the plaintiff and defendant did not adjoin, the plaintiff had gained no right of support for his house from the defendants; but the court expressly guarded themselves from stating what their opinion would have been if the two houses had immediately adjoined each other. It seems that the judgment of Bramwell, B., was expressly founded on the circumstance that the plaintiff's enjoyment of the support for his house was not shown to have been open and as of right (*Solomon v. The Vintners' Company*, 4 *Hurls. & Nor. R.*, 585; *S. C.*, 28 *L. J. Ex.*, 370).

Where two persons are owners in severalty of two moieties of a party wall, with cross-rights of easement, neither can pull down his own portion of the wall without being liable for disturbing the rights of the other; and in a note to an English case, hereinbefore referred to, a preference is given to ownership by parties in

severalty of two moieties of a party wall, with cross-rights of easement, over a tenancy in common, on the ground that partition might be claimed by tenants in common; in which case each would hold his share in severalty, without being liable for the consequences if he pulled down his share of the wall and deprived the other of support (*Wiltshire v. Sidford*, 1 *Man. & Ryl. R.*, 403, note; *S. C.*, 8 *Barn. & Cres. R.*, 259, note). And even where no right of support exists, if the party pulling down his wall, proceeds so irregularly and improperly that his neighbor is subjected to more than ordinary risk, he may be liable to an action if an accident occurs; although, it seems, the party injured may not have done all that he could for his own protection (*Walters v. Pfeil*, 1 *Mood. & Malk. R.*, 364). And although the property injured may have been so infirm that it could only have lasted a few months longer, the party improperly removing his own wall to the detriment of the injured property would be liable, for no person has a right to accelerate the fall of his neighbor's house because it happens to be in an insecure state. The age and condition of the property injured is merely a circumstance to be taken into consideration by the jury in determining the amount of negligence and assessing the proper damages (*Dodd v. Holme*, 1 *Adolph. & Ell. R.*, 493; *S. C.*, 3 *Nev. & Man. R.*, 739).

The doctrine was laid down to its fullest extent in a case before the English Court of Common Pleas, where the defendants were held liable for carelessness in underpinning a party wall between their property and the plaintiff, whereby injury occurred to the latter. The plaintiff, in his declaration, charged the defendants with conducting themselves so carelessly, negligently and improperly in pulling down their house, and in omitting to use proper precaution in that behalf, that large quantities of bricks, mortar, etc., fell from the defendants' house into and upon the plaintiff's house, broke the windows, skylights, etc., and occasioned great consequential damage. The plaintiff, therefore, complained not of some mere omission on the part of the defendants, but of their doing certain acts in so negligent a manner that by those very acts the plaintiff's house was injured; and the court held that it made no difference whether the plaintiff was owner in severalty of the half of the wall which was next his house, or whether he and the defendants were tenants in common of the whole wall; for that in either case the action was maintainable (*Bradbee v. Christ's Hos*

pital, 4 *Man. & Granger's R.*, 761; and *vide Davis v. Blackwall Railway Company*, 1 *ib.*, 799; *Jones v. Bird*, 5 *Barn. & Ald. R.*, 837; *Gayford v. Nicholls*, 9 *Exch. R.*, 708).

Mention may be made of a case in the English Court of King's Bench which involved the principle, where the lessor of the premises covenanted to repair and keep in repair all the external parts of the demised premises. He was held liable to repair a boundary wall, although it adjoined other buildings. The court said that the wall, even before the neighboring house had been removed, was an external part of the demised premises; that the external parts of premises are those which form the inclosure of them, and beyond which no part of them extends; and that it is immaterial whether those parts are exposed to the atmosphere or rest upon and adjoin some other building, which forms no part of the previous lot (*Green v. Eales*, 2 *Queen's Bench R.*, 225; see *McClure v. Little*, 19 *Law Times*, N. S., 287).

If a man build his own house with the eaves projecting so as to discharge rain-water from his roof upon his neighbor's property, it is a nuisance for which an action will lie. But the right to compel the owner of the adjoining property to receive all the water dropping from the roof of a house may be acquired by prescription. This doctrine has long since been well settled, especially by the various courts of England, and there is no doubt of its universal application (*Vide Lady Brown's Case*, *Palmer's R.*, 446; *Baton's Case*, 9 *Coke's R.*, 536; *Fay v. Prentice*, 1 *Com. Bench R.*, 828; *Battishill v. Reed*, 18 *ib.*, 696; *Tucker v. Needman*, 11 *Adolph. & Ell. R.*, 40; *Jones v. Parkell*, 1 *Maule & Selwyn's R.*, 234). And where this right exists it will not be destroyed by heightening or in any other way altering the house from which the water falls, so long as the burden upon the servient tenement is not increased (*Thomas v. Thomas*, 2 *Cr., Mees. & Ros. R.*, 34). But a right to discharge water by drops upon the property of another gives no right to collect the water in a spout or gutter, and discharge it in a single stream over his land (*Reynolds v. Clarke*, 2 *Id. Raym. R.*, 1399; *Washburn on Easements*, 392).

It seems that the rule of the civil law upon this subject was, in some respects, more liberal than that of the common law. By the civil law a right of building in such a way as to overlay the adjoining property, and of discharging rain-water, might be acquired by

user; these rights were called *servitus projiciendi*, and *servitus stillicidii et fluminis recipiendi*. The same law also recognized the servitudes *tigni immittendi* and *oneris ferendi*. By the former of these, a man might compel his neighbor to submit to a beam being let into or placed upon his wall. By the latter, the owner of a house might be compelled to give support to the adjoining house or wall, and might even be compelled in some cases to keep the servient tenement in repair, though while the repairs were in progress he was discharged from the obligation of giving support (*Colquhoun's Summary*, §§ 941-943; *Gale on Easements*, 4th ed., 478-483; *Hunt's Law of Bound. and Fences*, 2d ed., 119).

It is understood that tenancy in common of a party wall or fence does not imply any obligation on the part of one tenant in common towards his co-tenant to repair. If two owners are owners in severalty of two moieties of a party wall, either may maintain trespass for injury done to his half of the wall, and, in case of ouster, may bring ejectment for the same (*Matts v. Hawkins*, 5 Taunt. R., 20; *Trothe v. Simpson*, 5 Car. & Payne's R., 51; and vide *Murly v. McDermott*, 8 Adolph. & Ell. R., 138). But neither trespass nor trover will lie by one tenant in common against another, unless there has been a total destruction or conversion of the common property; neither will ejectment lie unless an actual ouster of the plaintiff from the common property by the defendant be proved (*Vide Tyler on Ejectment*, 41, 42, 199, and authorities cited; also *Stedman v. Smith*, 8 Ell. & Black. R., 1; *Jacobs v. Seward*, 4 L. R., C. P., 328). The authorities are clear that trespass will lie for pulling down a wall or destroying a tree, carrying away boundary stones, grubbing up a hedge, and the like injuries to the common property; but not for pulling down a wall with intent to rebuild it, though an action on the case in the nature of waste might lie, under such circumstances, as it will in any other case where one tenant in common misuses the common property. But Bayley, J., in pronouncing judgment in one case in the English Court of King's Bench, declared that if one of two tenants in common of a wall heightened it to a greater extent than was proper, the remedy of the other was to remove the addition, and that was the only remedy he could have (*Corbitt v. Porter*, 8 Barn. & Cres. R., 270; and vide *Noye v. Reed*, 1 Mees. & Ros. R., 63; *Murray v. Hall*, 7 Com. Bench R., 441;

Waterman v. Soper, 1 *Ld. Raym. R.*, 737; *Voyce v. Voyce*, *Gow's R.*, 201; *Co. Litt.*, 200, b.).

No action can be maintained by one tenant in common against another for merely clipping a hedge, or cutting trees in it of a proper age and growth, because that would have the effect of enabling one tenant to prevent another from taking the fair profits of the estate (*Martyn v. Knollys*, 8 *Term R.*, 145; *Jacobs v. Seward*, 4 *L. R.*, *C. P.*, 328). And it has been held that a covenant not to grub up trees or hedges is broken by removing them from one part of the premises to another, or by taking them away (unless they were decayed) for the purpose of planting a larger number in their stead (*Doe d. Witherall v. Bird*, 6 *Car. & Payne's R.*, 195). If trees be severed from the freehold by one of two tenants in common, and converted into money, the joint interest is at an end; they are owners in severalty of the money produced by the sale, and an action for money had and received may be supported by one against the other for his share (*Wheeler v. Herne*, *Wille's R.*, 209; *Martyn v. Knollys*, 8 *Term R.*, 146).

An occupant of land who is bound to maintain a fence between his own and an adjoining inclosure may place half a fence, of reasonable dimensions, on the land of the adjoining owner; and he may cut half of a ditch on the land of such owner, where a ditch is proper for a partition fence (*Newell v. Hill*, 2 *Met. R.*, 180). And it may also be affirmed that, where a person has once become liable, either by agreement or prescription, to repair a fence for the benefit of his neighbor, he will be liable for all the consequences arising from his neglect if he fail to make the requisite repairs. Thus, in a leading case in the English Court of Exchequer, it was held that an action was maintainable against the defendant for the defective state of his fences, which he was bound to repair, *per quod* the plaintiff's horses escaped into the defendant's close and were there killed by the falling of a haystack (*Howell v. Salisbury*, 2 *Younge & Jervis' R.*, 391). And in a very old English case, where the plaintiff's horse escaped into the defendant's field, through defects in fences which the defendant was bound to repair, and was there killed by falling into a ditch, it was held that the defendant was liable for the consequences (*Anonymous*, 1 *Ventris' R.*, 264). This doctrine is well illustrated by cases arising in the States where fences are regulated by statute, which will be referred to hereafter. It may be stated in this connection

that if cattle escape into an adjoining close through defects in the fences, which the tenant of the close is bound to repair, he is not justified in driving them into the highway and leaving them there. Said Lord Denman, of the English Court of King's Bench : "It is perfectly clear that the least to be expected from a party in the situation of the defendant here is that he should put back the sheep into the place in which they were before they quitted it in consequence of his neglect" (*Carruthers v. Hollis*, 8 *Adolph. & Ell. R.*, 113; *S. C.*, 3 *Nev. & Perry's R.*, 246).

To enable one adjoining owner to maintain an action against another in consequence of defective fences, it is not necessary that the injury should have happened to his own beasts. The action will equally lie for injury committed to animals in his temporary possession, and even although he may be only a gratuitous bailee. Thus, in the English Court of King's Bench, where A. sent his horse for the night to B., who turned it out after dark into his pasture field, adjoining to and separated from a field of C. by a fence which C. was bound to repair, and the horse, from the bad state of the fences, fell from one field into the other and was killed, it was held that B., though a gratuitous bailee, might maintain an action against C. for the value of the horse. Mr. Justice Holroyd said : "The plaintiff was entitled to the benefit of his field, not only for the use of his own cattle, but also for putting in the cattle of others, and by the negligence of the defendant in rendering the field unsafe he is deprived in some degree of exercising his right of using that field for either of those purposes. Whether, therefore, the damage accrues to his own cattle, or the cattle of others, he still may maintain an action." And Lord Ellenborough observed : "The plaintiff certainly was a gratuitous bailee, but as such he owes it to the owner of the horse not to put it into a dangerous pasture, and if he did not exercise a proper degree of care he would be liable for any damage which the horse might sustain. Such liability is sufficient to enable him to maintain this action; he has an interest in the integrity and safety of the animal, and may sue for a damage done to that interest" (*Booth v. Wilson*, 1 *Barn. & Adolph. R.*, 59; *vide Broadwater v. Blot*, *Holt's R.*, 547). And in a case in the American courts, the plaintiff brought his action against the defendant for not repairing his fences, *per quoad* the plaintiff's horses escaped into the defendant's close, and were there killed by the falling of a hay

stack. It was held that the damage was not too remote, and that the action was maintainable (*Powell v. Salisbury*, 2 *Younge & Jerv. R.*, 391).

But the obligation to repair the fences is only toward the occupier of the adjoining close, and not toward strangers; and therefore, a party seeking to take advantage of the obligation, either as excusing a trespass or as rendering the obligor liable for injuries happening to his cattle, must show an interest in the adjoining close, or a right to have his cattle there. For if the cattle of one man escape into the land of another, it is no excuse that the fences were out of repair, if they were trespassers in the place from whence they came. This doctrine is obvious in principle, and is also well settled by authority (*Vide Right v. Baynard*, 1 *Freeman's R.*, 379; *Sir George Sackville v. Milward*, 22 *H.*, 6, 7, 8; *Singleton v. Williamson*, 7 *Hurlstone & Norman's R.*, 410; *S. C.*, 31 *L. J., Exch.*, 17). The owner of an uninclosed field may maintain trespass against the owner of an animal grazing there, unless such owner can show a right to have his animal there, or a legal excuse for such animal being at large (*Wells v. Howell*, 19 *Johns. R.*, 385). And upon this principle it has been held that an action will not lie for carelessly leaving maple syrup in an uninclosed wood, whereby the plaintiff's cow, being suffered to run at large, and having strayed there, is killed in drinking it. The reason assigned was that the cow had no right there (*Bush v. Brainard*, 1 *Cow. R.*, 78). The *nucleus* of the authorities upon the subject is the ancient maxim, that no man shall take advantage of his own wrong or negligence, in his prosecution or defense, against another.

The foregoing are principles of universal application, and are recognized both where the subject of fences is regulated by statute, and where it is not. It is pertinent, therefore, that they be distinctly referred to in this place.

CHAPTER XXX.

STATUTES OF THE SEVERAL STATES RESPECTING FENCES — LAWS OF NEW YORK — RULES RESPECTING DIVISION FENCES — PRESUMPTIONS WHERE THE SUFFICIENCY OF A FENCE COMES IN QUESTION — PLEADINGS IN SUCH CASES.

By the statutes at present in force in the State of New York, where two or more persons shall have lands adjoining, each of them is required to make and maintain a just and equal proportion of the division fence between them, in all cases where such adjoining lands shall be cleared or improved. And where such adjoining lands shall border upon any of the navigable lakes, streams or rivers within this State, it is made the duty of the owners thereof to maintain such division fence down to the line of low-water mark in such lakes, streams and rivers. Whenever such adjoining lands, one-half or more of which are improved, shall be bounded by or upon either bank of a stream of water not navigable, the fence-viewers of the town in which the same are situated are required to direct, in the manner specified in the statute, upon which bank of such stream, and where, upon such bank, the division fence shall be located, and the portion thereof to be kept and maintained by each of such adjoining owners (1 *R. S.*, Part 1, ch. 11, tit. 4, art. 4, § 30, as amended by Laws of 1871, ch. 635, § 1, and Laws of 1872, ch. 377).

The statute further provides that where two or more persons shall have lands adjoining and not within the provisions of the foregoing section, as amended, each of them shall make and maintain a just and equal proportion of the division fence between them, except the owner or owners of either of the adjoining lands shall choose to let such lands lie open; and if he shall afterward inclose it, he is required to refund to the owner of the adjoining land a just proportion of the value, at that time, of any division fence that shall have been made and maintained by such adjoining owner, or he must build his proportion of such division fence. And where a person shall have cleared or improved lands lying open, he is required to refund to the owner of the adjoining land, which is also cleared or improved, a just proportion of the value of any division fence that shall have been made and main-

tained by such adjoining owner between such cleared and improved lands, or he must build his proportion of the division fence. Whenever a subdivision or new apportionment of any division fence shall become necessary by reason of the transfer of the title of either of the adjoining owners to the whole or any portion of the adjoining lands by conveyance, devise or descent, such subdivision or new apportionment must thereupon be made by the adjoining owners affected thereby; and either adjoining owner must refund to the other a just proportion of the value, at the time of such transfer of title, of any division fence that shall theretofore have been made and maintained by such other adjoining owner or the person from whom he derived title, or he must build his proportion of such division fence. The value of any fence, and the proportion thereof to be paid by any person, and the proportion to be built by him, must be determined by any two of the fence-viewers of the town (1 *R. S.*, *Part 1*, *ch.* 11, *tit.* 4, *art.* 4, §§ 31, 32, *as amended by Laws of 1871*, *ch.* 635, §§ 2, 3).

It will be observed that this statute touching division fences does not prescribe the kind of fence that shall be made. Each proprietor of lands adjoining is to make and maintain a just proportion of the division fence, except one of them shall choose to let his land lie open. But when the Legislature speaks of *fences*, and division fences, some idea of what a fence is is at once suggested to the mind. There is no statute, for example, authorizing the erection of a crooked or Virginia fence upon the line, as a division fence between adjoining proprietors, and yet, as a matter of fact, a large proportion of all the division fences between adjoining farms, in the State of New York, are the worm or Virginia fence, leaving half the corners upon the land on one side of the mathematical line, and the other half upon the other side. This kind of fence has been built as a division fence in the State, time out of mind, so that it has become a part of the common law of the State that adjoining owners of farms may erect such fences as division fences, occupying the necessary quantity of land upon each side of the mathematical line; and such fence is a fence, in contemplation of law, upon the line between the adjoining farms. And the courts have, indirectly at least, decided in accordance with this view (*Vide Ferris v. Van Buskirk*, 18 *Barb. R.*, 397). The Supreme Court of the State has recently held that the doctrine, as to division fences

being placed partly on the land of each owner, has its foundation entirely in the statute. But it was declared that, under the statute, it is clear, upon principle and authority, that the owners are bound to erect and maintain a line or division fence, and should make it equally upon the lands of each (*Warren v. Sabin*, 1 *Lansing's R.*, 79, 80).

It has been decided that the exception made in the statute, in favor of owners of adjoining lands who "shall choose to let such land lie open," was intended to apply to cases where lands have been partially fenced as well as those in which the owner chooses to let his land lie altogether *in commons*. The language of the statute is quite broad and comprehensive, and is held to include any case where the owner does not choose to inclose his land entirely (*Chrysler v. Westfall*, 41 *Barb. R.*, 159). Previous to the amendment of 1866, the exception of the statute was in favor of those who chose to let their lands lie open "to a public common," instead of "to the public;" and the courts held that, under the exception as it then stood, the person who wished to avoid maintaining a just proportion of the division fence, between such land and that owned by another person adjoining, must do what amounted to a license to the people of the town to go upon it, and allow their cattle to feed upon it without being trespassers, until he revoked such license and built or paid the expense of building his just proportion of such division fence. It was said that when land merely "lies open," everybody must keep off of it, and also prevent their cattle going upon it, or they will be trespassers. But if it lies open "to a public common," the law implies that the owner is willing that any person may go upon it, and that cattle in the neighborhood may feed upon it. This was the construction put upon the words of the statute, and that was declared to be their obvious and material meaning (*Perkins v. Perkins*, 44 *Barb. R.*, 134).

The present Supreme Court of the State has declared, upon authority, that no one but the adjoining owner or possessor has any interest in the duty or obligation of another to build or maintain a division fence (*Ryan v. The Rochester and Syracuse Railroad Company*, 9 *How. Pr. R.*, 453). But the old Supreme Court had previously declared that, under the statute, there could be no reasonable doubt but that *any person* occupying the adjoining land, and interested in building and maintaining a division fence

in order to secure the full enjoyment of the use of his premises, would be entitled to the benefit of the statute regulation, without regard to the *particular estate therein* belonging to him. It was said that the right to build and maintain the fence seemed necessarily incidental to the right to enjoy the use of the land. The latter depends upon the former; and if the fence may or must be built, to enjoy the use of the premises, the adjoining occupants should each build the half of it. It was thought to be for the benefit of each that the law should be so; for, if the statute does not apply, then the rights of the occupants are as at common law, and each is bound to keep his cattle within the boundary line; and it was suggested that the statute was enacted to relieve adjoining occupants from the inconvenience of this rule of the common law (*Bronk v. Becker*, 17 *Wend. R.*, 320).

The statute regulating the erection and maintenance of division fences has been held by the courts of the State to be applicable to division fences between railroad companies and the owners of the adjoining lands. It was accordingly further held that where a fence, between a railroad and the adjoining farms, which it is the duty of the landowners to keep in repair, is destroyed by fire communicated by the engines in use upon the railroad, and the railroad company neglects to rebuild such fence, this will not render the company liable for the value of a horse which strays upon the track of the road, from an adjoining pasture where it is kept, through the open fence, and is killed by the engine. Although the railroad company may be liable to pay the owners of the fence the damages occasioned by the burning thereof, it was held that it was under no legal obligation to repair it, under such circumstances; nor have the owners a right to abandon the rest of their property, and charge the railroad company for all the damages they may sustain by reason of such neglect or abandonment, while the fence remains unrepaired (*Terry v. The New York Central Railroad Company*, 22 *Barb. R.*, 574).

The statute further provides that where two or more persons shall own lands adjoining, in case either of them shall sell, convey or devise such lands, or any portion thereof, the owner of any division fence that shall have been theretofore made and maintained by him shall not be deprived of his interest therein in consequence of such sale, except so far as relates to the grantor; and in all cases where such sale or devise shall interfere with or

affect the division fences existing between such adjoining owners at the time of such sale, or on receiving such devise, a subdivision of such division fence shall then be made by all the adjoining owners affected thereby; and each adjoining owner must refund to the owner of the adjoining land a just proportion of the value at the time of such sale, or on receiving such devise of any division fence that shall have been theretofore made and maintained by such adjoining owner, or that shall have been made and maintained by the persons from whom he received such title, or the adjoining owner must build his proportion of such division fence. The value of such fence, and the proportion thereof to be paid by such person, and the proportion of the division fence to be built by him, must be determined by any two fence-viewers of the town (*Laws of 1866, ch. 540, § 4*).

If dispute arises between the owners of adjoining lands, concerning the proportion or particular part of fence to be maintained or made by either of them, such dispute must be settled by any two of the fence-viewers of the town; and when any of the aforesaid matters shall be submitted to fence-viewers, each party shall choose one; and if either neglect, after eight days' notice, to make such choice, the other party may select both. The fence-viewers are required to examine the premises and hear the allegations of the parties. In case of their disagreement, they must select another fence-viewer to act with them, and the decision of any two is made final upon the parties to such dispute, and upon all parties holding under them. The decision of the fence-viewers must be reduced to writing, must contain a description of the fence, and of the proportion to be maintained by each, and must be forthwith filed in the office of the town clerk (*1 R. S., Part 1, ch. 11, tit. 4, art. 4, §§ 33-36, as amended by Laws of 1850, ch. 319*).

It is further provided by the statute that if any person, liable to contribute to the erection or reparation of a division fence, shall neglect or refuse to make and maintain his proportion of such fence, or shall permit the same to be out of repair, he shall not be allowed to have and maintain any action for damages incurred, but shall be liable to pay to the party injured all such damages as shall accrue to his lands, and the crops, fruit trees and shrubbery thereon, and fixtures connected with the said land, to be ascertained and appraised by any two fence-viewers of the town, and to

be recovered with costs of suit; which appraisement must be reduced to writing, and signed by the fence-viewers making the same; but the same is made only *prima facie* evidence of the amount of such damage (1 R. S., Part 1, ch. 11, tit. 4, art. 4, § 37, as amended by Laws of 1838, ch. 261).

It has been held by the old Supreme Court of the State that this provision of the statute has not changed the common-law rule, that, where the cattle of one of two adjoining proprietors are found trespassing upon the land of the other, the owner of the cattle, to excuse himself, must show not only that the fences which the proprietor was bound to maintain were out of repair, but also that the cattle passed over such defective fences. And it was, accordingly, further held that, where the boundary fence between adjoining proprietors had been divided, and distinct portions assigned to each to erect and maintain, and in an action brought by one of them for an injury by the cattle of the other it appeared that both portions of the fence were out of repair, and it was not shown over what part the cattle passed to the plaintiff's land, the plaintiff was entitled to recover (*Deyo v. Stewart*, 4 Denio's R., 101). The same court had previously held that, where one's cattle are lawfully placed on A.'s land, and escape thence to the land of another, their owner is entitled to the same exemption from liability, by virtue of the statute, that A. might claim in case the cattle had been his, but nothing more. Accordingly, where B.'s cattle were rightfully pasturing on land owned and occupied by A., and they escaped thence to the adjoining land of C. through a defect in the division fence which A. was bound to repair, it was held that C. might maintain trespass against B. And it was intimated that, as the cattle were on A.'s land with his consent, he might be treated as owner of them for all the purposes of a remedy, either at the common law or under the statute. Bronson, J., gave the opinion of the court, and some of his remarks are so pertinent, in respect to the effect of the statute, that they may well be extracted. He says: "Unless one of the owners chooses to let his land lie open, each party is bound to make and maintain a just proportion of the division fence; * * * and the party who is in default has no remedy for a trespass by the cattle of the adjoining owner. * * * When the party who suffers by the trespass is not in fault in relation to the division fence, the statute has, to some extent, given him a new remedy by calling in the

fence-viewers to appraise his damages ; but as the act of 1838 has restricted the damages, and made the appraisement only *prima facie* evidence of the amount, the new remedy is no longer of any great value. By the Revised Statutes, the party who permitted his portion of the fence to be out of repair was liable to pay the party injured 'all such damages as shall accrue thereby;' and it came very near being decided that this not only made him liable for the trespass of his own cattle, but for all the consequences which might result to his neighbor's cattle through his neglect to repair. The members of the Court for the Correction of Errors were equally divided in opinion upon the question (*Clark v. Brown*, 18 *Wend.*, 213). This case led to the act of 1838, which restricts the remedy of the injured party to such damages as shall accrue to his lands, crops, fruit trees, shrubbery, and fixtures connected with the land" (*Stafford v. Ingersol*, 3 *Hill's R.*, 38, 40). The doctrine of this case has been several times approved by later decisions, and it is certainly good law (*Vide Burnham v. Onderdonk*, 41 *N. Y. R.*, 425, 433; *Handman v. Bowen*, 39 *ib.*, 196, 198; *Lowry v. Inman*, 37 *How. Pr. R.*, 153, 158; *Dean v. Eldridge*, 29 *ib.*, 218, 222).

In an early case before the present Supreme Court of the State, it appeared that Hewitt and Watkins were the owners of adjoining land. Watkins let his land lie open, and Hewitt built the whole of the division fence between them. Afterward Watkins inclosed his land, and a dispute having arisen between the parties as to the value of the division fence and the proportion thereof which Watkins ought to pay to Hewitt, it was held that the fence-viewers of the town had jurisdiction of the matter, under the statute. And it was further held that the decision of the fence-viewers, in such a case, should be reduced to writing and filed in the office of the town clerk ; and that where the dispute is as to the value of the fence, and the proportion thereof which one party should pay to the other, it should specify such sum, and an action will lie to recover the same. And further, if the dispute relate only to the value and sum to be paid, and there be no dispute about the proportion of the fence to be maintained by each, the certificate is valid, although it is silent about the proportion to be maintained by each. It was said to be enough that it disposes of the matter submitted to the fence-viewers (*Hewitt v. Watkins*, 11 *Barb. R.*, 409).

The statute provides that where any person, who has been determined by the fence-viewers to be liable to contribute to the erection or reparation of a specified portion of a division fence, shall neglect or refuse to contribute to the same, as required, for the period of one month after request in writing to make or repair such fence, the party injured may make or repair the same at the expense of the party so neglecting or refusing, to be recovered from him, with costs of suit. And if any person who shall have made his proportion of a division fence shall be disposed to remove his fence and suffer his lands to lie open, he may do so, provided such lands are not cleared or improved, at any time between the first day of November in any one year, and the first day of April following, but at no other time, giving ten days' notice to the owner or occupant of the adjoining land of his intention to apply to the fence-viewers of the town for permission to remove his fence; and if at the time specified in such notice any two of such fence-viewers, to be selected as aforesaid, shall determine that such fence may with propriety be removed, he may remove the same (1 *R. S.*, *Part 1*, *ch. 11*, *tit. 4*, *art. 4*. §§ 38, 39, *as amended by Laws of 1871*, *ch. 635*, § 4). And it is declared by the statute that if any such fence shall be removed, without such notice and permission, the party removing the same shall pay to the party injured all such damages as he may sustain thereby, to be recovered, with costs of suit (1 *R. S.*, *Part 1*, *ch. 11*, *tit. 4*, *art. 4*, § 40).

Where there has been a division fence between the owners of adjoining lands, and one of them, after having given the notice and obtained the permission of the fence-viewers in the case provided by the statute, removes his part of the fence, and his cattle enter upon the lands of his neighbor, the owner of such cattle is liable to an action of trespass at the suit of his neighbor, notwithstanding the fence was not removed until the permission was duly obtained, and within the time specified by the statute. This doctrine is extracted from a case decided when the statute was substantially as it is at present. And it was held in the same case, and it is applicable as the law now is, that the only effect of throwing up land, or permitting it to lay open, is to remit the parties to their common-law rights and duties, which are: that a tenant of a close is not obliged to fence against an adjoining close, and without such fence may bring trespass for an entry of cattle; the

owner of the cattle being obliged to keep them on his own premises, in the absence of an agreement or prescription about fences (*Holladay v. Marsh*, 3 *Wend. R.*, 142; and *vide Richardson v. McDougal*, 11 *ib.*, 46).

It is provided by the statute that whenever a division fence shall be injured or destroyed by floods, or other casualty, the person bound to make and repair such fence, or any part thereof, shall make or repair the same, or his just proportion thereof, within ten days after he shall be thereunto required by any person interested therein. Such requisition must be in writing, and signed by the party making it. And if such person shall refuse or neglect to make or repair his proportion of such fence for the space of ten days after such request, the party injured may make or repair the same at the expense of the party so refusing or neglecting, to be recovered from him, with costs of suit (1 *R. S.*, *Part 1*, *ch.* 11, *tit.* 4, *art.* 4, §§ 41, 42). It may be stated that, as the statute formerly stood, persons owning vacant lots in a city or village could not be required to contribute to the erection and maintenance of a division fence, provided they chose to let their lots lie open to the public. But as the law now stands, they may be required to maintain a just proportion of the division fences between their lots and those of the adjoining owners, provided their lots are cleared or improved, as is most usually the case.

In the matter of practice, the statute provides that witnesses may be examined by the fence-viewers on all questions submitted to them; and either of such fence-viewers has the power to issue subpœnas for, and to administer oaths to such witnesses, and each fence-viewer and witness thus employed is entitled to one dollar and fifty cents per diem. Such fence-viewers, or a majority of them, must determine what proportion of such fees shall be paid by each of the parties interested in such division fence, and reduce their determination to writing, and subscribe the same and file it in the office of the town clerk where such fence-viewers shall reside. The party refusing or neglecting to pay such fence-viewers, or either of them, is made liable to be sued for the same with costs of suit (1 *R. S.*, *Part 1*, *ch.* 11, *tit.* 4, *art.* 4, § 43, *as amended by Laws of 1866*, *ch.* 540, § 6).

It is also provided by the statute that where the sufficiency of a fence shall come in question in any suit, it shall be presumed to have been sufficient, until the contrary be established (1 *R. S.*,

Part 1, ch. 11, tit. 4, art. 4, § 45). This is an important provision in respect to evidence, and should be remembered. And again, it seems to be well settled, as another question of practice, that the insufficiency of a fence, when an excuse for a trespass, is matter of defense, and this, or any other matter of defense to excuse the trespass, must be shown by the defendant (*Colden v. Eldred*, 15 *Johns. R.*, 220).

An interesting case was very lately decided by the Supreme Court of the State, wherein it appeared that the plaintiff and defendant occupied adjoining lands; the plaintiff removed a portion of the line fence between them and notified the defendant that he had done so, and to remove his cattle, which the defendant did not do, but shortly afterward removed the remainder of the fence. The court held that the defendant was liable for damage done to the plaintiff's field by the cattle, after the entire fence between them had been removed. Johnson, J., delivered the opinion of the court, and a single paragraph from the opinion will show the ground of the decision. The learned judge said: "It appears from the evidence that the line fence between the two farms was one which both parties had been in the habit of removing late in the fall, to prevent its being carried away by the spring floods, and replacing again in the spring after the high-water was over. The plaintiff, before the commission of the injuries, removed his portion of the fence first, and gave notice to the defendant Henry to take out his cattle. The defendant Henry, within a few days afterward, removed his portion of the line fence also, but did not take his cattle out of the field separated by the line fence from plaintiff's meadow. There being no line fence kept up by either party, the defendant Henry was liable for the injury done by his cattle upon the plaintiff's land" (*Van Slyck v. Snell*, 6 *Lans. R.*, 299, 302).

CHAPTER XXXI.

STATUTES OF THE SEVERAL STATES RESPECTING FENCES — LAWS OF NEW YORK — SUFFICIENCY OF FENCES IN THE STATE, HOW DETERMINED — POWERS OF THE ELECTORS OF THE TOWNS IN SUCH CASES.

THE statutes of the State of New York do not prescribe what shall be deemed a lawful fence within the State; but, in lieu of that, it is provided that the electors of each town shall have power at their annual town-meeting, among other things, to make from time to time such prudential rules and regulations as they may think proper, for the better improving of all lands owned by such town in its corporate capacity, whether commons or otherwise; for maintaining and amending partition and other fences around the same, or any part thereof, and circular fences for their lands, gardens, orchards and meadows; for protecting such lands from any trespass, and for directing the time and manner of using the same. And they have the power, in like manner, to make the like rules and regulations for ascertaining the sufficiency of all fences in such town; for determining the times and manner in which cattle, horses or sheep shall be permitted to go at large on highways; and for impounding animals. And it is further provided that every order or direction, and all rules and regulations, made by any town-meeting, shall remain in force until the same shall be altered or repealed at some subsequent town-meeting (1 *R. S.*, *Part 1*, *ch. 11*, *tit. 2*, *art. 1*, §§ 5, 9).

There is another provision of the statute to the effect that, whenever the electors of any town shall have made any rule or regulation prescribing what shall be deemed a sufficient fence in such town, any person who shall thereafter neglect to keep a fence according to such rule or regulation shall be precluded from recovering compensation, in any manner, for damages done by any beast, lawfully going at large on the highways, that may enter on any lands of such person, not fenced in conformity to the said rule or regulation, or for entering through any defective fence (1 *R. S.*, *Part 1*, *ch. 11*, *tit. 4*, *art. 4*, § 44).

There has been considerable discussion in the courts of the State in respect to the power of towns under these provisions of the statute, and a doubt was early expressed whether, under a similar

statute, a town had power to interfere with the interior economy or management of a man's farm, by compelling him to keep his swine or other animals shut up in a close pen, or other inclosure. And a by-law, that "all hogs shall be kept up," was construed to mean that no hogs should go at large; which meant that they should not be free commoners upon the highway. It was clearly intimated that a town had no power to prevent the inhabitants from letting their hogs go at large upon their own land. But it was distinctly declared that, if the defendant's hogs go into the adjoining land of the plaintiff by reason of the partition fence, which the plaintiff is bound to keep in repair, being insufficient, he cannot maintain an action of trespass, and in the case before the court it appeared that the trespass complained of was not done through the *outer fence*, adjoining a highway or common, but through an *inner* or *partition fence* between the two neighbors, and, therefore, it was held that the by-law had no application, and that the case rested upon common-law principles, independent of the by-law (*Shepherd v. Hees*, 12 *Johns. R.*, 433). Of course, if there be no rule or regulation in the town allowing cattle and other animals to run at large, if they break through an outer fence, adjoining a highway or common, the doctrine of the common law will apply, and the owner will be liable in trespass, although the fence may be defective or insufficient. Indeed, as against a highway, where cattle have no right to run, no fence at all is necessary to enable the plaintiff to maintain trespass. The old Supreme Court of the State held, at a very early day, in a case where it appeared that the defendant's cattle entered the uninclosed field of the plaintiff and destroyed the grass, it not appearing that there was any regulation of the town as to fences, or as to cattle running at large, that the defendant was liable for the damages in an action of trespass (*Wells v. Howell*, 19 *Johns. R.*, 385).

The question has also been considerably discussed as to whether the statute, authorizing towns to make rules and regulations for ascertaining the sufficiency of fences in such towns, and determining the times and manner in which animals shall be permitted to go at large on highways, hereinbefore given, is justified by the Constitution of the State, and the matter was for some time in considerable doubt. It was argued that the public have but a servitude or easement of way over private lands taken for high-

ways; and, consequently, the public and individuals have no right to or power over it, except as a way. It was thought that if the public or others than the owners of the fee of the road could depasture, they could dig up the soil, build upon it, and cut down the trees. If they could take the grass, no good reason was seen why they might not put it to other uses. It was also argued that if taking the land for a highway gives to others a right to depasture it, then it is not true that private property of one cannot be taken for the private use of another; and the boasted security to private property in this respect, supposed to be afforded by our laws, is nothing more than a false though beautiful sentiment; and it was further argued that even if a town has power, as a matter of police regulation, to compel the owner to fence along the highway, and keep his own cattle off certain portions of the year, that confers no authority to give a license to other persons to appropriate the productions of the soil to their own use. This reasoning was certainly very forcible to show that neither a town nor the State has power to give a right to individuals to use the land appropriated as a highway only as a public thoroughfare for travel, and that all except this right of use by the public remains in the owner of the soil, and cannot be taken from him for private use without his consent or due process of law. Depasturing of land is no part of its use as a highway; and if the statute authorizes towns to license owners of cattle to turn them at large on to the highways for the purpose of grazing, it was supposed by many to be so far unconstitutional and void; and this idea seemed to be sanctioned by some of the decisions of the courts. In a case before the old Supreme Court of the State, Savage, Ch. J., said: "Suppose a case where a town has no common land, and they pass a by-law permitting cattle to run at large, where are they to run? Surely not on individual property. Where then? in the highway? The public have simply a right of passage over the highway; they have no right to depasture the highway. The owner of the land through which the highway runs is the owner of the soil, and of the timber, except what is necessary to make bridges or otherwise, and in making the highway passable (15 *Johns. R.*, 453); and if the owner of the soil owns the timber, why not the grass? This question has never been distinctly raised in this court; and some intimations have been given, from which it might be inferred that towns have a right to permit

cattle to run at large in the highways; but in *Stackpoole v. Healy* (16 *Mass. R.*, 33) the question has undergone a very full consideration and discussion; and the Supreme Court of Massachusetts have decided that the public have no such right in highways. The statute in that State is in stronger terms than ours; but it was holden to relate to *common lands* only, and not to highways" (*Holladay v. Marsh*, 3 *Wend. R.*, 142, 147). But the point was not decided by the court in the case, because no regulation of the town was shown permitting cattle to go at large; and the cattle for whose trespass the action was brought were held to be in the highway without authority from the town. The same doctrine, however, was laid down by the same court at a much later date, when Beardsley, Ch. J., said: "The public interest in a highway comprehends the right of every individual to pass and repass upon it, in person and with his property, at his own pleasure; but confers no right to use it as a sheep-walk, or pasture ground for cattle. Subject to this right of passage, and the right to make repairs and the like, the soil of a highway and the grass and herbage growing thereon are still, in the strictest sense, private property. * * * Cattle at large in the highway will not only trample down, but also crop and eat the grass and herbage there growing; and if the Legislature have power to authorize their running at large the grazing cannot be wrongful. What would this be but taking the private property of the owner of the land as a highway, and transferring it to the owner of the cattle? In my judgment the Legislature have no such power, whether compensation be made or not; but certainly in no case, unless compensation is made. On this strict ground, I think the town regulation assuming to authorize cattle to '*run at large*,' was wholly void" (*The Tonawanda Railroad Company v. Munger*, 5 *Denio's R.*, 255, 264). But in this case, the remarks in respect to the effect of the statute under consideration were *obiter*, because it was substantially held by the court that the provisions of the statute did not apply to the case at bar. The case was taken to the Court of Appeals, and the judgment of the Supreme Court was affirmed, independent of the considerations presented in the extract from the opinion of Chief Justice Beardsley, above quoted; and the doctrine was laid down that a railroad corporation, by proceedings duly taken under its charter, acquires the *title* to lands appropriated for the use of the road. And, therefore, when cattle escape

from the inclosure of the owner and stray upon the track of a railroad, they are regarded as trespassing upon the lands of the railroad company (*Munger v. The Tonawanda Railroad Company*, 4 *N. Y. R.*, 349). The decision of this case in the Court of Appeals was really made upon the ground that the wrongful act of the plaintiff co-operated with the misconduct of the defendant to produce the damage complained of. But it is proper to remark that, since the damage in that case accrued, the general railroad act of 1848 has been passed; and subsequently it has been held that a railroad corporation which omits to comply with the statute, as to erecting fences and cattle-guards, is liable to the owner of the cattle which stray upon the track from an adjoining close, or the highway crossing it, and are there injured by the engines of the company, although they were not lawfully in such close or highway. In such case, the mere negligence of the owner in permitting his cattle to run at large in the highway which crosses the railroad of the company is not now a defense to the corporation (*Corwin v. The New York and Erie Railroad Company*, 13 *N. Y. R.*, 42). This is not pertinent to the subject now under consideration, and still it is proper to note the change in the rule in this place.

But it has now been settled, so far as the Supreme Court of the State can settle it, that the statute empowering "the electors of each town, at their annual town meeting, to make rules and regulations for ascertaining the sufficiency of all fences in such town, and for determining the times and manner in which cattle, horses or sheep shall be permitted to go at large on highways," is not contrary to the Constitution of the State; and it has, consequently, been held that the owner of a close, through whose defective fences cattle, lawfully in an adjoining close on the highway, have entered, cannot maintain an action against the owner of such cattle for damages. This was so held, in the first place, by a divided court, in a case in which Willard, J., delivered the prevailing opinion, in which he examined all of the authorities upon the subject, and said: "In all the cases in which the unconstitutionality of the act in question has been doubted, the reasons assigned have been, that the soil and grass growing on a highway belong to the owner of the land through which the road passes, and that the public have merely a right of passage; and that the effect of the town by-law is to take the private property of the owner of the land, without

compensation, for the use of those who permit their cattle to run at large on the highway. * * * Whatever may have been the force of this argument prior to the Revised Statutes, it is obvious that since the 1st of January, 1830, it is based upon a false assumption. It takes for granted that the owner of the land receives compensation merely for the easement or right of passage. This is not so. The statute which regulates the compensation to be made to the owner through whose lands public highways are laid, does not confine the damages to what arises from parting with a mere right of way. * * * It might be competent for the Legislature to take the entire fee of the land; in which case the compensation should be increased accordingly. It is presumed that the public become vested with such interest as the Legislature authorize them to use. * * * The damages of the owner of the soil are regulated by what he relinquishes to the public. He thus is compensated by what he relinquishes to the public. He thus is compensated not only for parting with the right of way, but for parting with the right of pasturage. Hence the main argument on which the objection to the law rests is untenable.

It cannot with truth be said that a by-law like the one in question takes the property of one man and gives it to another, or even to the public, without compensation. The owner of the soil is not deprived of the pasturage, any more than he is of the way. He can enjoy both in common with his neighbors. * * * The right, therefore, to establish highways over the land of an individual, against his consent, and the duty of making compensation therefor, must be considered not only with reference to the easement of a way, but also with reference to the right of common for such domestic animals as the Legislature, at the same time, authorized the electors of the town to permit to run at large on the highway. The presumption, therefore, is that the owner of the soil has been compensated for the easement of a way and the right of pasturage, and that the present occupant held the land in subordination to the rights exercised by the electors of the town of Pierpont." This view was concurred in by Paige, P. J., but Hand, J., dissented (*Griffin v Martin*, 7 Barb. R., 297, 303, 304, 306).

The case of *Griffin v. Martin* did not go to the Court of Appeals, but it has been referred to in several subsequent cases

with approval in the same court; and in a later case before the same court, the doctrine laid down was expressly affirmed, and the statute under consideration was unanimously approved. Harris, J., delivered the opinion of the court, and after giving the terms of the statute, said: "It is due to the fame of the revisers to notice that the section just quoted is not their production. Nothing half so clumsily or obscurely expressed ever came from their hands. The section was engrafted on the article that had been reported, while on its way through the Legislature. It is one of those enactments which Lord Coke described as 'penned or corrected, on a sudden, by men of very little or no judgment in the law.' I am not quite sure that I comprehend it; but if I have been able to discover its meaning, the section constitutes a statutory bar to every action brought to recover damages for injuries done by cattle entering through a defective fence, which the party complaining is bound to maintain, in any town where the electors have prescribed what shall be deemed a sufficient fence. This construction of the statute is, of course, fatal to the plaintiff's cause of action.

"Having come to this conclusion, I have not deemed it necessary to discuss at length the validity of the statute which authorizes the electors of a town to determine the times and manner in which horses, cattle and sheep shall be permitted to go at large on highways. It is enough to say, that I have not much doubt of its constitutionality. The statute has been in existence since 1788 at least. Lands occupied as highways may well be deemed to have been acquired with reference to the exercise of the authority thus conferred upon the electors of the town. This authority had been exercised without being questioned from the commencement of the State government, until Judge Cowen, in his elaborate note to the case of *Bush v. Brainard* (1 Cowen, 78), suggested a doubt as to the right of the Legislature to confer this authority upon the electors of the towns. This doubt was reiterated by Chief Justice Savage in *Holloday v. Marsh* (3 Wend., 142). And yet, substantially the same provision, but in more explicit and unequivocal terms, was reported by the revisers, and adopted by the Legislature in the revision of 1830. * * * In *Griffin v. Martin* (7 Barb., 297), the question came before this court under circumstances very similar to those presented in this case; and it was determined by a majority of the court (Hand

J., dissenting) that the statute in question is not in conflict with the Constitution. In that decision I concur. I regard the right to allow cattle, horses or sheep to go at large on highways as one of the easements or servitudes pertaining to the land occupied as a highway. The right is supported by usage as old as the history of our country. The land is to be presumed to have been taken with reference to this usage and the exercise of this right by the proper authorities. The owner may well be presumed to have been compensated for this, as well as every other easement or servitude to which the land, as a highway, may be subjected" (*Hardenburgh v. Lockwood*, 25 Barb. R., 9, 11, 12). The subject having come squarely before the court in this case, and the validity of the statute in question having been unanimously affirmed, the matter may be considered at rest, unless it shall hereafter be otherwise determined by the court of last resort. It has been thought advisable to dwell thus much upon the subject here, from the fact that a considerable impression has obtained from the opinion expressed by the late Judge Cowen, in his valuable and popular Treatise on the Civil Jurisdiction of Justices of the Peace, adverse to the validity of the statute, provided the Legislature intended to give to the electors of towns the power which was clearly expressed. The views of Judge Cowen will appear from the following extracts from his work: "The expression used in the old statute was, *to go at large*; and town meetings were authorized to determine the *places* as well as the *times* and *manner* of cattle, etc., going at large. Under that statute it was thought questionable whether the Legislature intended to confer upon towns the power of authorizing cattle, etc., to run at large in the highway. The better opinion seemed to be that no such power was delegated to the towns, inasmuch as the language used was ambiguous; and it was fair to presume that the Legislature would not, even though it were concluded they had the constitutional right to do so, take the property of one man and confer the right of using it upon others, without expressing themselves clearly to that effect. * * *

By reference to the present statute, it will be seen that no doubt as to the *intention* of the Legislature can exist. A radical change in the provision of the statute has been effected. Formerly, towns could regulate *partition* and *circular* fences; which provision, as we have seen, was held to apply only to fences inclosing the common lands of the towns. They could also regulate the times,

places and manner of permitting cattle, etc., to go at large. Now, they are authorized to make rules and regulations for ascertaining the sufficiency of '*all fences*' in the town; that is, whether such fences inclose the *common lands* of the town or the lands of individuals. Also for determining the *times* and *manner* in which cattle, etc., shall be permitted to go at large on highways. As if to remove all doubts in relation to the intention of the Legislature, the word '*places*,' which was contained in the old statute, is struck out, and the words '*on highways*' inserted. So that, under the existing statute, the towns have power to authorize the *running at large* of cattle on highways, provided the statute enforcing that power be not unconstitutional. * * * That part of the provision of the statute which authorizes towns to prescribe what shall be deemed a sufficient fence in such town may be, and, undoubtedly, is proper and constitutional. The object of this enactment is simply to prevent a recovery for damages done by beasts lawfully going at large on highways, that may enter on lands not fenced in conformity to the rule prescribed by the town, or for entering through any defective fences. The difficulty is as to the authority of the Legislature to enact that cattle are lawfully at large on the highway, except in the one case of using it for the legitimate purposes of a road" (*Cowen's Tr.*, 2d ed., 383, 386, 387).

Soon after the organization of the present Supreme Court of the State, a case came before the court, wherein McCunn, P. J., incidentally examined the constitutionality of the statute under consideration, and after declaring that the question presented did not call for a determination of the validity or effect of the statute, said: "We cannot, therefore, undertake to decide the question at present, though we think there can be very little doubt of the constitutionality of the power as conferred by and expressed in the statute, but that the power is not to be understood as authorizing the making of a town law, by which horses, cattle and sheep shall be permitted promiscuously to run at large and depasture the highways of the town. On the contrary, the going at large as authorized by the statute, must be under rules and regulations as to *time* and *manner*; and we think that these words in the statute are restrictive, and are to be construed with a due regard to the rights of property and individual ownership of the soil of highways. That the power of a town-meeting cannot lawfully be

exercised, beyond allowing the owners of the soil to turn their own animals out to feed on such parts of the highway as they respectively own under such safeguards (rules and regulations) as shall prevent any obstruction of the public use or travel, and as shall at the same time avoid collisions and trespasses by the beasts of one owner upon the property of another" (*White v. Scott*, 4 *Barb. R.*, 56, 59). Under this narrow construction of the statute, it has been well said, none but the great landholders could derive any benefit from it. The poor tenants and other inhabitants, not owners of the soil, would be entirely excluded, and this forced construction has been entirely overruled by the later decisions. So the statute is held, not only to be constitutional, but to confer upon the electors of the towns the power which its plain language imports. The question was formerly much more important to the agricultural population of the State than it is at present. At an early day, the highways of the State were pretty generally depastured, but at present, very many of the towns have no rules permitting cattle and other beasts to go at large, and the highways are without fences, and their margins are cultivated or cropped.

CHAPTER XXXII.

STATUTES OF THE SEVERAL STATES RESPECTING FENCES — LAWS OF NEW YORK — OBLIGATIONS OF RAILROAD COMPANIES IN RESPECT TO FENCES — CONSEQUENCES OF NEGLECT.

IN respect to the obligations of railway companies in the State of New York to maintain fences along their roads, the statute provides that every corporation formed under the general railroad act, shall erect and maintain fences on the sides of their road, of the height and strength of a division fence required by law, with openings or gates or bars therein, and farm crossings of the road for the use of the proprietors of lands adjoining such railroad and also construct and maintain cattle-guards at all road crossings, suitable and sufficient to prevent cattle and animals from getting on to the railroad. And until such fences and cattle-guards are duly made, the corporation and its agents are made liable for all damages which shall be done by their agents or engines,

to cattle, horses or other animals thereon; and while such fences and guards are duly made and maintained, the corporation will not be liable for any such damages unless negligently or willfully done (*Laws of 1850, ch. 140, § 44; 3 Stat. at Large, 635, 636*). By a subsequent act, every railroad corporation within the State is required, before the lines of its road are opened, to erect and thereafter maintain fences on the sides of its road of the height and strength of a division fence, as required by law, and farm crossings and cattle-guards as in the other section provided, sufficient to prevent cattle, horses, sheep and hogs from getting on to such railroad. And so long as such fences and cattle-guards shall not be made, and when not in good repair, such railroad corporation and its agents are made liable for damages as in the other section provided. The statute further declares that a sufficient post and wire fence of requisite height shall be deemed a lawful fence, within the provisions of the act. But no railroad corporation is required to fence the sides of its roads, except where such fence is necessary to prevent horses, cattle, sheep and hogs from getting on to the track of the railroad from the lands adjoining the same. It is made the duty of every owner of land adjoining any railroad, who has received a specific sum as compensation for fencing along the line of land taken for the purpose of said railroad, and has agreed to build and maintain a lawful fence on the line of said road, to build and maintain such fence; and if said owner, his heirs or assigns, shall not build said fence within thirty days after being notified so to do by the said railroad corporation, or shall neglect to maintain said fences, if built, said corporation must build and thereafter maintain such fence, and may maintain a civil action against the person so neglecting to build or maintain said fence, to recover the expense thereof (*Laws of 1854, ch. 282, §§ 8, 9; 3 Stat. at Large, 643, 644*). And there is still another provision of the statute, by which the lessee or lessees of the railroad of any railroad corporation are required to maintain fences on the sides of the road so leased, in the same manner, and under the same conditions as the original corporation was previously obligated and required (*Laws of 1864, ch. 582, § 2; 6 Stat. at Large, 367, 368*).

The Court of Appeals of the State have held that the railroad act, as it now stands, was passed from public considerations, and that its purpose was to protect the traveling public as well as

farmers along the lines of the roads. The court further held that, under the provisions of the act, railroad companies are required to fence both sides of their track, and are liable for damages done to cattle as long as such fences are not made and kept in good order. And it was held to be no defense that the party whose cattle were killed was legally bound to build such fence, under a covenant between his assignor and the company. It was the duty of the company to see the fence built; and, failing in that, it was liable. Judge Peckham, who delivered the opinion of the court, also gave a construction to the clause of the statute, declaring that "no railroad corporation shall be required to fence the sides of its roads except where such fence is necessary to prevent horses, etc., from getting on to the track of the railroad from the lands adjoining the same." As the learned judge construed the statute, it was probably aimed at rivers or lakes, through whose borders the railroads might run, and where a fence would be unnecessary; or, in other cases, where high rocks or other obstructions would render it unnecessary to fence against the invasion of cattle (*Shepard v. The Buffalo, New York and Erie Railroad Company*, 35 N. Y. R., 641, 646). The case holds, therefore, that the railroad acts impose the duty upon railroad companies to fence both sides of their track, with the exceptions stated, and that they are liable for damages done to cattle, so long as such fences are not made and kept in good order.

The doctrine of the last case cited was approved in a later case, before the same court, in which it was declared that the passage of the act in question, being induced by public considerations, and its purpose being to protect the traveling public and the owners of domestic animals along the line of railroads, should receive a liberal construction to effectuate the benign purpose of its framers. The action was for damages for killing a cow through the alleged negligence of the defendant. The injury complained of was caused by an engine of the defendant, while running, not upon its own track or road, but upon that of the Troy Union Railroad Company, a corporation that embraced the directors of the defendant and also of other companies, who alone, by the charter of the Troy Union Railroad Company, and a contract therewith, were authorized to operate the road of the latter. The defense to the action was that the defendant was not liable for injuries caused by running its engines upon the track of the Troy

Union Railroad Company, without erecting or maintaining the fences or cattle-guards required by statute. The court held that the defendant was essentially an owner and operator of the road, and, within the spirit and intent of the statute in regard to fences, was liable for the injury complained of. And the court approved the doctrine of the case of *Clement v. Canfield* (28 Vt. R., 302), that the lessee of a railroad, while operating it, is liable if the fences are not maintained (*Tracy v. The Troy and Boston Railroad Company*, 38 N. Y. R., 433).

It seems from another case decided by the Court of Appeals that, notwithstanding the obligations imposed upon railroad companies by the statute to maintain the fences along their roads, the proprietors of lands adjoining have also a duty in this regard. Said Selden, J.: "There is no doubt that although the statute imposes upon the railroad company the absolute duty of maintaining fences, gates, etc., yet a duty in this respect also devolves upon the proprietors along the road. They have no right quietly to fold their arms and voluntarily to permit their cattle to stray upon the railroad track, through the known deficiency of the fences which the corporation are bound to maintain. As it would be impracticable for the railroad company to keep a constant watch of every gate and every rod of fence along the line of its road, it is but reasonable to require of the proprietors, where defects have actually come to their knowledge, to make suitable efforts to apprise the company of such defects. In enforcing this rule, however, upon proprietors, care should be taken not to exempt the company, upon which the primary duty rests, from its due share of responsibility" (*Poler v. The New York Central Railroad Company*, 16 N. Y. R., 476, 481). This rule, of course, can never be applied where no fence has ever been built along the line of the road, and probably few cases will arise where damage has resulted from defects in the fences along the road, of which the company was not presumed to be informed (*Vide McDowell v. The New York Central Railroad Company*, 37 Barb. R., 195; *Staats v. The Hudson River Railroad Company*, 33 How. Pr. R., 139). The Court of Appeals have also settled the principle that, where a railroad corporation neglects to maintain fences and cattle-guards along its road, as required by the general railroad act, and cattle get upon the track and are injured by its engines and cars, the corporation is liable to the owner in damages,

although he is not an adjoining proprietor, and it does not appear how or whence the cattle came upon the road. And it seems that a railroad corporation, which omits to comply with the statute as to erecting and maintaining fences and cattle-guards, is liable to the owner of cattle which stray upon the track from an adjoining close, or the highway crossing it, and are there injured by the engines of the company, although they were not lawfully in such close or highway. In such case, therefore, the mere negligence of the owner, in permitting his cattle to stray upon the land of another adjoining the railroad, or to run at large in the highway which crosses it, is no defense to the corporation. And it was declared in the case before the court, that the duty imposed by the statute upon railroad corporations is not limited to the maintenance of fences and cattle-guards, as against the animals of adjoining occupants, or those lawfully in the highway (*Corwin v. The New York and Erie Railroad Company*, 13 N. Y. R., 42). The Supreme Court of the State had, previously to this decision, expressed a doubt, as to whether a railroad company, upon which it is obligatory to make side fences, which it had omitted to construct, is responsible for the destruction of horses that had wandered upon its track from the field of an adjacent owner, into which they had escaped from the land of their owner, through a defective fence which the adjacent owner was bound to make (*Underhill v. The New York and Harlem Railroad Company*, 21 Barb. R., 489). But the question would now seem to be set at rest by the Court of Appeals in the decision of the case of *Corwin v. The New York and Erie Railroad Company*, *supra*.

The Supreme Court of the State has held that, under the provision of the statute requiring railroad companies to erect and maintain fences on the sides of their roads, if a fence is thrown down, or blown down, or becomes defective from any cause, it becomes the duty of the railroad company to restore it within a reasonable time. And though a fence is thrown down, and an opening left therein, by a trespasser, yet if it is suffered to remain in that condition an unreasonable length of time, a jury has a right to find that this is negligence in the railroad company. And it was further held that, when a railroad company is in default, for not repairing a gap in a fence, and a horse passes through the gap, upon the railroad track, and is there killed, the mere negligence of the owner in permitting the horse to run at large in a

highway, or to trespass upon a neighbor's premises, will not constitute a defense to an action against the railroad company, to recover the value of the horse (*Munch v. The New York Central Railroad Company*, 29 Barb. R., 647; and *vide Chapman v. The New York Central Railroad Company*, 33 N. Y. R., 369).

The Supreme Court has also held that the sections of the general railroad act, providing that the corporations subject to the act shall erect and maintain fences on the sides of their road, etc., make no distinction, in terms, in respect to this duty, between cases in which the lands of the corporation, occupied by the road, were obtained by agreement with, and conveyance from, the owners, and those in which title was acquired by the compulsory proceedings authorized by the act, and that none was intended by the Legislature (*Clarke v. The Rochester, Lockport and Niagara Falls Railroad Company*, 18 Barb. R., 350). And the same court has also held that, in an action against a railroad company for negligence in running over and killing a horse, where the injury is alleged to have occurred in consequence of a defect in a fence which the defendant was bound to maintain, if there is *any* evidence that the fence was insufficient and defective, and that the defendant's agents knew or had notice of it, and that the horse got upon the track by means of such defect, it is erroneous to nonsuit the plaintiff. And it was accordingly held that, if in such a case, there is any evidence that the horse got upon the railroad track over or through a fence which the defendant was bound to maintain, it should be submitted to the jury; but not so of evidence that possibly the horse so got upon the track. If there is no evidence that the horse got upon the track in the manner alleged, of course, the plaintiff should be nonsuited (*Morrison v. The New York and New Haven Railroad Company*, 32 Barb. R., 568).

It has been before shown that the lessee of a railroad, while operating it, is liable for damage to cattle by reason of defective fences which the lessor is bound to maintain; but the Supreme Court has held that, where a railroad company, by an arrangement with another company, run their cars over the road of the latter company, and an injury is sustained by an individual, by the killing of his cow by the locomotive, which injury occurs not from any negligence in the running of the cars, but in consequence of the omission to erect cattle-guards or fences, the company owning

the locomotive is not liable. And in the same case, it was held that, where, in an action against a railroad company to recover damages for an injury to the plaintiff's property, the complaint merely alleges that the injury was occasioned by the neglect to construct *cattle-guards*, a recovery cannot be had for an omission to build *fences* (*Parker v. The Rensselaer and Saratoga Railroad Company*, 16 *Barb. R.*, 315).

The case of *Parker v. The Rensselaer and Saratoga Railroad Company*, has never been expressly overruled, but its soundness has been questioned in a late case before the same court, in which the judge, who delivered the opinion, regarded the construction of the statute given, as, to say the least, a very strict construction, of a remedial statute, and not quite in the spirit or views of construction given by the Court of Appeals, in *Tracy v. The Troy and Boston Railroad Company* (38 *N. Y. R.*, 437), and the judge was satisfied that the rule adopted in the latter case was sounder than that of the former, especially when applied to a remedial statute induced by public considerations (*Burchfield v. The Northern Central Railway Company*, 57 *Barb. R.*, 589, 591). Besides, the case of *Parker v. The Rensselaer and Saratoga Railroad Company*, was decided before the act of 1864, which extended the provisions of the general statute so as to create a like liability against the *lessees* of any railroad, including not only other railroad companies who may be made such lessees, but any person or persons, who may be such lessee or lessees, the terms of which have been hereinbefore given, and if the defendant in the case could be regarded as the *lessee* of the Saratoga and Schenectady railroad on which the damage was done, of course, it would be liable as the law now stands. In the case of *Burchfield v. The Northern Central Railroad Company*, the defendant was running a railroad belonging to another corporation, and using it for the ordinary purposes of a railroad, for its own benefit, under and by virtue of a written agreement with the owner, and for a period only fixed by the terms of a lease made to another corporation, and assigned to the defendant, who agreed to pay the rent reserved in the lease. The court held that the defendant was the *lessee* of such road, within the meaning and intent of the general railroad act of 1850, and the act of 1864, amending the same and extending its provisions to the *lessees* of any railroad. And that as such lessee, it was liable for the value of a cow killed by its

engine upon the track, in consequence of the defendant's neglect to maintain fences and cattle-guards as required by the statute. It was declared that the term *lessees*, in the statute, is to have such construction as was intended by the Legislature, to meet the then known and existing condition of things; to meet the case of parties using a road, as the substitute of the owners, and exercising the rights of owners, under some right or permission for a consideration to be paid to the owners.

The present Supreme Court of the State held, at an early day, that the failure of a railroad company to erect and maintain fences on the sides of their road, as required by the general railroad act of 1848, does not make the company liable for damages to cattle which have entered on the railroad from the owner's land, through the want of a fence which the owner was bound to build and keep in repair. And that, notwithstanding the general railroad act requires the railroad company to erect and maintain on the sides of its road fences of the height and strength of a division fence, as required by law, yet the owner of the land through which the road passes, who has agreed with the company, for a valuable consideration received, to erect and maintain such fence on his own land, adjoining such railroad, and who has neglected to fulfill said agreement, cannot maintain an action against the company for a cow killed by the company's engine while passing on said road, which cow escaped on to the road through a want of fence which the plaintiff was bound to build and keep in repair. And it was held in the case that a parol agreement between the owners of the adjoining land that one of them will, for an adequate consideration, erect and keep up the division fence between them, is not within the statute of frauds, which renders void an agreement not to be performed within a year (*Talmadge v. The Rensselaer and Saratoga Railroad Company*, 13 Barb. R., 493). And the same court recognized the same doctrine in a later case, in which it was held that where a fence, between a railroad and the adjoining farms, which it is the duty of the landowners to keep in repair, is destroyed by fire communicated by the engines in use upon the railroad, and the railroad company neglects to rebuild such fence, this will not render the company liable for the value of a horse which strays upon the track of the road from an adjoining pasture, where it is kept, through the open fence, and is killed by the engine (*Terry v. The New York Central Railroad Company*

22 *Barb. R.*, 574). But these two cases may, perhaps, be considered as substantially overruled by the decision of the case of *Shepard v. The Buffalo, New York and Erie Railroad Company*, hereinbefore referred to.

In a case just reported, which was decided by the Supreme Court in September, 1873, it appeared that the plaintiff's cattle got through a fence bordering the defendant's railroad on to the track, and were killed. The defendant had covenanted, in the deed of its roadway, at the point of the accident, to "make and maintain good and sufficient fences on both sides" of the strip of land taken. The court, at nisi prius, refused to charge the jury "that a compliance by defendant with the statute as to fences exonerated it from liability, irrespective of the covenant in the deed." The court, at General Term, held this to be error, and reversed the judgment in favor of the plaintiff on the verdict of the jury, and granted a new trial; declaring that the performance of the statute by the defendant was the performance of the covenant, and that the jury should have been so instructed (*Thompson v. The New York and Harlem Railroad Company*, 1 *N. Y. Supreme Court R.*, 411). This is correct doctrine; but it is difficult to see how the refusal of the judge to charge in the language requested could have misled the jury. What he did charge was substantially what the court in banc declares the law to be.

The Supreme Court held, in January, 1854, that, under the general railroad act of 1850, there was no obligation imposed upon a railroad corporation, so far as its servants employed upon its engines are concerned, to erect and maintain fences on the sides of the road, so as to render such corporation liable for an injury happening to a servant thus employed, in consequence of its neglect to fence against cattle; that, although fences along the line of railroads, protecting the track from cattle on adjoining lands, are an important measure of necessity, both to the agents and servants of the companies and to the public, yet, in the absence of a legislative provision, making their erection an absolute duty to the public, the courts cannot properly impose it as a duty, and hold its non-performance to be negligence *per se*, disregarding all other circumstances. And it was held that, under such general railroad act of 1850, requiring all railroad corporations to erect and maintain fences on the sides of their road, and declaring that, in case of omission to do so by any corporation, the corporation

and its agents shall be liable for all damages which shall be done by their agents or engines to *cattle, horses or other animals* thereon, the duty is one in respect to the owners of such *animals* only; and that the liability prescribed is all that is incurred by a violation of it (*Langlois v. The Buffalo and Rochester Railroad Company*, 19 *Barb. R.*, 364). This action was brought to recover for personal injuries caused by an engine being thrown from the track by reason of cattle straying upon the track for want of a fence that the defendant was bound to maintain; and probably none of the amendments of the general railroad act provide for such a case; certainly, there is not at present any legislative provision making the maintenance of fences along the sides of railroads an absolute duty to the public, although the duty is enjoined; but the damages recoverable in case of neglect seem to be confined to those for injuries to cattle and other animals on the road.

It was observed that the statute provides that, until railroad corporations construct fences on the sides of their road, they and their *agents* are made liable for all damages which shall be done by their *agents* or engines to cattle and certain other animals upon the road. The Supreme Court of the State has held that, where the corporation is liable under this provision, its engineer in charge of the engine at the time, and the brakeman employed by *him*, are liable jointly with the company, and that all three are *severally* liable (*Suydam v. Moore*, 8 *Barb. R.*, 358). Hand, J., dissented from the judgment in this case, on the ground that the agents or servants of a railroad company could not be made liable for an injury not occasioned by any fault of theirs. But the doctrine of the case has been several times sanctioned by the Court of Appeals, and it may be regarded as good law (*Vide Bruff v. Mali*, 36 *N. Y.*, 200, 205; *Phelps v. Wait*, 30 *ib.*, 787-789; *Corwin v. The New York and Erie Railroad Company*, 13 *ib.*, 42, 50).

Thus much for the law relating to fences along the sides of railroads in the State, and the statement is thought to embrace and cover the whole subject.

CHAPTER XXXIII.

STATUTES OF THE SEVERAL STATES RESPECTING FENCES — LAWS OF NEW YORK — RULES RELATING TO ENCROACHMENTS BY FENCES UPON HIGHWAYS — FENCE-VIEWERS AND THEIR DUTIES AND POWERS — SOME POINTS RELATING TO FENCES, MISCELLANEOUSLY STATED — FENCES IN THE CITY OF NEW YORK — IMPOUNDING OF ANIMALS TRESPASSING UPON FENCED INCLOSURES.

RESPECTING encroachments by fences upon highways, the statute provides, that in every case where a highway shall have been laid out or ascertained, described and entered of record in the town clerk's office, and the same has been or shall be encroached upon by fences erected by the occupant of the land through or by which such highway runs, the commissioners of highways of the town shall, if in their opinion it be deemed necessary, order such fences to be removed, so that such highway may be of the breadth originally intended. The commissioners making the order must cause the same to be reduced to writing and signed. They are required also to give notice in writing to the occupant of the land to remove such fences within sixty days. Every such order and notice must specify the breadth of the road originally intended, the extent of the encroachment and the place or places in which the same shall be (1 *R. S.*, *Part 1*, *ch.* 16, *tit.* 1, *art.* 5, § 103, *as amended by Laws of 1870, ch.* 125).

The present Supreme Court of the State has held that, where a public highway originally laid out six rods in width, was fenced only four rods wide, and had been used as thus fenced for thirty years, and there was no evidence that the public had suffered any annoyance or inconvenience from the fences, the fences were not a public *nuisance*, which could be abated as such, by the commissioners of highways. And it was further held that, where a simple *encroachment*, not constituting a public *nuisance*, has existed in a highway for twenty years, the premises taken by the encroachment cease to be a part of the highway, and the landowner, under such circumstances, cannot be disturbed in his possession without making him just compensation. Proceedings, therefore, under this statute can not be sustained in such a case (*Peckham v. Henderson*, 27 *Barb. R.*, 207). The old Supreme Court of the State, however, had held that the statute authorizing commis-

sioners of highways to order the *removal of fences* by the erection of which, highways have been *encroached upon*, does not abrogate the common-law remedy of *abatement of nuisance* by the mere act of individuals, or abolish the proceeding by *indictment*; that is to say, the remedy given by the statute would appear to be cumulative. And the court held that the object of the statute seemed to have been to provide a remedy in doubtful or questionable cases (*Wetmore v. Tracy*, 14 *Wend. R.*, 250). The doctrine of this case is doubtless correct, but it is not every *encroachment* upon a highway by fences, that will amount to a *nuisance* (*Howard v. Robbins*, 1 *Lans. R.*, 63); and where it does not, the only remedy would seem to be the one pointed out by the statute, although when the *encroachment* by fences amounts to an *obstruction* of the highway, the common-law remedy may be pursued. The case of *Wetmore v. Tracy* was one in which the encroachment amounted to a nuisance, and the removal of the fence in question was clearly justified by necessity. But the present Supreme Court of the State has expressly held that a mere encroachment on a highway, by a fence, will not authorize the removal of the fence by an individual, unless it hinders, impedes or obstructs the use of the road by the public; and further, that an encroachment of a fence upon the highway is not a public nuisance, so as to authorize an individual to abate it, unless it interferes with the use of the road by the public. It was declared however, that, if the encroachment rendered the passage over the road less convenient or safe than it would have been, but for the encroachment, the owner of the fence would be liable to an indictment for a nuisance (*Harrower v. Retson*, 37 *Barb. R.*, 301). The *annoyance* to the public by the fence must be of a real and substantial nature, or an *indictment*, probably, will not lie (1 *Russell on Crimes*, 318; *Griffith v. McCullum*, 46 *Barb. R.*, 561). But if the fence encroaches in the least, it may be removed by proceedings under the statute, as the public is entitled to the whole width of the road.

The Court of Appeals of the State have held that, where a board of trustees of an incorporated village are invested with authority "to exercise the powers and duties of commissioners of highways of towns within the limits of the village, etc., so far as these powers and duties are consistent with other parts of the act, and are applicable to the village," and where there is no provision

in the act requiring such board to notify proprietors to remove structures encroaching upon the streets of the village, such board may proceed to remove such structures without giving sixty days' notice as is required by commissioners of highways (*Walker v. Caywood*, 31 *N. Y. R.*, 51).

It has been held by the old Supreme Court of the State, that in a proceeding under the statute by commissioners of highways for the removal of an encroachment upon a road by fences, the order and notice must describe the place and extent of the encroachment with accuracy and precision, and specify the breadth of the road as originally intended. It was accordingly held, in the case, that an order and notice describing the encroachment as of "*the average width of one rod or upwards*," was insufficient, and further, that a notice directing the removal of the fence, "*so that the highway might be of the breadth originally intended*," without stating what that breadth was, was not good under the statute (*Mott v. The Commissioners of Highways of Rush*, 2 *Hill's R.*, 472). And in an earlier case before the same court, it was held that, when a statute prescribes the *form* of an order or other summary proceeding, it must be followed as far forth as is consistent with the nature and exigency of the particular proceeding. It was accordingly held, that an order for the removal of fences made by *two* commissioners in the case of an encroachment of a highway was void, *it not appearing on the face of the order* that the *third* commissioner was *duly notified* to attend the meeting of the board, and apprised of *the purpose* for which he was required to attend (*Fitch v. The Commissioners of Highways of Kirkland*, 22 *Wend. R.*, 132; but *vide Tucker v. Rankin*, 15 *Barb. R.*, 471, 481).

If the fences encroaching upon the highway are not removed within sixty days after the service of the notice specified, the statute provides that the occupant to whom the notice shall be given shall forfeit the sum of fifty cents for every day, after the expiration of that time, for which such fences shall continue unre-moved; and the commissioners of highways may remove or cause to be removed such encroachment, and the occupant of the premises is required to pay to the commissioners of highways all reasonable charges therefor, to be collected in the manner provided in the act. But it is provided by the statute that if the occupant to whom the notice is given shall, within five days, deny such

encroachment, the commissioners, or some one of them, shall apply to a justice of the peace of the county for a precept, directed to any constable of the town, to summon twelve freeholders thereof, to meet at a certain day and place, to be specified in such precept, and not less than four days after the issuing thereof, to inquire into the premises. The constable to whom such precept shall be directed must give at least three days' notice to the commissioners of highways of the town, and to the occupant of the land, of the time and place at which such freeholders are to meet (1 *R. S.*, *Part 1, ch. 16, tit. 1, art. 5*, §§ 104, 105, *as amended by Laws of 1840, ch. 300*). On the day specified in the precept, the jury are to be sworn by the justice, well and truly to inquire whether such encroachment has been made, and by whom. The witnesses produced by either party are also to be sworn by the justice, and the jury are to hear the proofs and allegations of the party. If the jury find an encroachment has been made, they are to make and subscribe a certificate in writing of the same, which must be filed in the office of the town clerk. The occupant of the land, whether the encroachment was made by him or by a former occupant, is required, in such case, to remove his fences within sixty days after the filing of such certificate, under the penalty before stated; and he is also required to pay the costs of the inquiry; and if the same shall not be paid within ten days the justice must issue a warrant for the collection of the same of the goods and chattels of the delinquent. But if the jury find that no encroachment has been made they must so certify, and also ascertain and certify the damages which the then occupant shall have sustained by the proceeding; which, together with the costs thereof, must be paid by the commissioners, and the same is made a charge in their favor against the town by which they shall have been elected. No person can be required to remove any fence under these proceedings, except between the first day of April and the first day of November in any year (1 *R. S.*, *Part 1, ch. 16, tit. 1, art. 5*, §§ 106–109).

Where commissioners of highways serve an order upon a person, directing him to remove a fence, which it is claimed is an encroachment on the highway, and such person denies the encroachment, his denial, in order to arrest the further action of the commissioners until a jury has been summoned, and the other proceedings taken as required by law, must be in writing. The statute does

not in terms require the denial to be in writing; but, upon principle and authority, it must be so in order to be legal and effectual (*Lane v. Cary*, 19 *Barb. R.*, 537).

It seems that, in a proceeding under this statute, the justice who issues the precept for the jury has no power to pass upon the qualifications of the persons returned as jurors (*Pugsley v. Anderson*, 3 *Wend. R.*, 468). But where a justice of the peace, upon the application of commissioners of highways, issues a precept to summon twelve freeholders for the purpose of inquiring into an alleged encroachment upon a highway, and the jury thus summoned meet, and find that the persons complained of have encroached on the highway; and they make a certificate in writing, stating the particulars of the encroachment, as required by the statute, the justice possesses all needful authority to decide upon the *amount* of the *costs* of the inquiry, as incidental, and absolutely necessary, to enable him to issue the warrant for the collection of such costs, which the law requires him to issue; and the act of the justice in liquidating the amount of such costs is judicial, and he is not liable therefor in a civil suit (*Voorhees v. Martin*, 12 *Barb. R.*, 508). The certificate of the jury, finding an *encroachment upon a highway*, must, in the language of the statute, state the particulars of such encroachment, alleging the encroachment to exist *according to the last survey* of a person named in the certificate, without annexing the survey, or referring to it as on file in a public office, is not a compliance with the act. When a statute prescribes the form, the very words of an order or other summary proceeding, those words must be used, at least as far as they can be applied to the nature and exigency of the particular proceeding (*Fitch v. The Commissioners of Highways of Kirkland*, 22 *Wend. R.*, 132). Indeed, none of the proceedings under this statute will be upheld, unless there is a substantial compliance with the form of procedure prescribed, as a safeguard against unadvised and improvident action (*The People v. Williams*, 36 *N. Y. R.*, 441).

In respect to the office of fence-viewers, in the State of New York, the assessors and commissioners of highways elected in every town, are made such of their respective towns, by the statute of the State by virtue of their offices (1 *R. S.*, *Part 1, ch. 11, tit. 2, art. 1, § 4*). The duties of the fence-viewers to settle disputes in respect to fences, have been detailed in a previous

chapter, and to enable them to discharge their duties the more fully, the statute provides, that witnesses may be examined by them on all questions submitted to them; and either of them may issue subpcnaes for, and administer oaths to said witnesses, and each fence-viewer and witness thus employed is entitled to one dollar and fifty cents per diem. Such fence-viewers or a majority of them, must determine what proportion thereof shall be paid by each of the parties interested in the matter of the fence to be adjusted, and they must reduce their determination to writing, and subscribe the same and file it in the office of the town clerk where such fence-viewers shall reside. The party refusing or neglecting to pay such fence-viewers, or either of them, will be liable to be sued for the same with costs (1 *R. S.*, Part 1, *ch.* 11, *tit.* 4, *art.* 4, § 43, as amended by *Laws of 1866, ch.* 540, § 6). The terms of the statute are very clear and explicit, and the courts have not been called upon, as yet, to give a construction to any of its provisions, excepting in respect to the sufficiency of the *determination* of the fence-viewers in the cases referred to. One case having a remote bearing upon this point, before the present Supreme Court of the State, has been hereinbefore referred to in which it was held that, where the dispute relates to the *value* of the fence, and the *proportion thereof* which one party should pay to the other, it should specify such sum, and an action will lie to recover the same (*Hewitt v. Watkins*, 11 *Barb. R.*, 409).

The existence of a dispute about a partition fence is sufficient to enable the fence-viewers to interfere (*Bryan v. Kortright*, 4 *Johns. R.*, 414). But in an action to recover the defendant's proportion of the expenses of putting up a partition fence, if no dispute had existed as to the proportion, a decision of the fence-viewers need not be shown. And in such a case, the costs and expenses of repairing are not to be settled by the fence-viewers. Parol proof of a written notice to repair is held to be sufficient in such cases (*Willoughby v. Carleton*, 9 *Johns. R.*, 136). It seems that any person distraining beasts doing damage-feasant upon his premises, who neglects to have his damages appraised by the fence-viewers within the statute time, forfeits the right to detain the animals for the damages, and the owner may retake them. The statute upon the subject is peremptory, and must be complied with, or the party loses or forfeits his right to detain the

animals distrained, and the owner may retake them (*Hale v. Clark*, 19 *Wend. R.*, 498).

An interesting case came before the courts of the State, several years ago, involving the powers of fence-viewers under the statute. Clark and Brown owned and occupied adjoining lands. Clark's oxen, pasturing in his lot adjoining Brown's, from defects in Brown's portion of the division fence, got into Brown's lot, where corn was growing, and ate so much of it that they died. The fence-viewers, being called in by Clark, assessed the value of the oxen as damages in his favor. It was held by the Supreme Court, that the damage sustained was not within the jurisdiction of the fence-viewers; that the damages they were authorized to determine under the statute, were only such as ordinarily result from defective fences, such as the treading down and destruction of corn, wheat and other crops, and grass. But the court declared that the judgment of the fence-viewers, if they keep within their jurisdiction, is conclusive. The decision was affirmed by the Court of Errors, its members being equally divided. Two of the members of the court who delivered opinions, laid down the rule that, in a case within their jurisdiction, the appraisement was merely evidence of the amount of the damage, and nothing more, and that the damage could not be recovered by action on the certificate. The late chancellor was of the opinion that an action on the case could not be sustained; that, under the statute, the certificate of the appraisers or fence-viewers was conclusive upon the questions of damages and the sufficiency of the fence, but not of a previous division of the partition fence between Brown and Clark, and that the fence-viewers had jurisdiction of the case. One senator was inclined to agree with the Supreme Court, as to the extent of the authority of the fence-viewers in appraising damages, and was of the opinion that in the case before the court, the damages sustained by Clark were not recoverable in any form (*Clark v. Brown*, 18 *Wend. R.*, 213). This case, so far as the jurisdiction of the fence-viewers in the matter of the damages involved, is now of no practical importance, from the fact, that the statute now in force, restricts the remedy of the injured party to such damages as shall accrue to his lands, crops, fruit-trees, shrubbery, and fixtures connected with the land; but the case is of value as showing the views of judges upon a statute in the terms of the one in force when it arose, and as an adjudication upon the effect

of the judgment of the fence-viewers in a matter of which they have jurisdiction.

Another point relating to fences, or closely connected therewith, was declared by the old Supreme Court of the State, in a case in which it was held that, where a party had an easement in the land of another, namely, the right to cut a ditch or water-course, the owner of the land had the right to erect fences across the water-course, and that if the other unnecessarily or wantonly removed them he was liable in *damages*, and that the owner, for such removal of the fences, was entitled to recover, though *no actual damage* was proved; upon the ground that every unauthorized entry upon the land of another is a *trespass*, for which an action lies though the damages be merely *nominal* (*Dixon v. Clow*, 24 *Wend. R.*, 188). It has been recently held by the present Supreme Court of the State that the general rule that, where a party is the owner of personal property which is upon the land of another, the former cannot commit a trespass by entering and taking it away, does not apply to that entry of a party which is necessary to enable him to make a partition fence between him and an adjoining owner. It was said that the law compels each owner to make his portion; and that this carries with it the right to such necessary occupation, for the time being as is required to comply with such legal duty (*Carpenter v. Halsey*, 60 *Barb. R.*, 45). And it may be added that still another point has been settled by the courts, not as being peculiar to the State of New York on account of its statutory policy, but independent of any legislative enactment; which is, that fencing materials on a farm, which have been used as part of the fences, but are temporarily detached, without any intent of diverting them from their use as such, are a part of the freehold, and pass by a conveyance of the farm to a purchaser (*Goodrich v. Jones*, 2 *Hill's R.*, 142; and *vide Walker v. Sherman*, 20 *Wend. R.*, 639, 640; *Bishop v. Bishop*, 11 *N. Y. R.*, 123, 125). And probably the same rule would apply in respect to rails which were placed upon a farm, with the design of being laid up into fences for the use of the farm. Doubtless, in such a case, the fence rails would be regarded as fixtures as between grantor and grantee, and pass by a conveyance.

The subject of fences in the State of New York will be concluded by a brief reference to the law regulating the subject in the city of New York. In that city it is provided by statute that

the common council shall have power to make rules and regulations for making, amending and maintaining as well partition fences as others, in the city, as such common council shall from time to time judge most proper and convenient (*Laws of 1813, ch. 35, § 20; 2 R. L., 134*). By virtue of this authority the common council of the city have, by ordinance, regulated partition fences and walls. The ordinance requires partition fences to be made and maintained by the owners of land on each side; and if the same can be conveniently divided, each party is required to make and keep in repair one-half part. All disputes respecting division fences, and the portions to be made and kept in repair by the owners respectively, or as to the sufficiency of such fences, are to be settled by the aldermen and assistant aldermen of the ward in which the same may be situated. In case the fence cannot be conveniently divided, the same is to be made and kept in repair at the joint and equal expense of the adjoining owners. All outside or boundary fences, and all fences on the line of any public road, street, avenue, or alley, must be five feet high and well and substantially built, so as to prevent the encroachment of cattle, sheep, hogs, and other animals. In case of the neglect of one adjoining owner to build his proportion of the division fence, the other may build it at the expense of the delinquent (*Revised City Ordinances, ch. 31, §§ 1-12*).

It will be observed that these regulations respecting partition fences in the city of New York are substantially the same as those adopted by the Legislature for other parts of the State; so that the decisions of the courts, under the statutes governing the subject in the country, may be consulted in similar cases arising in the city.

There is a statute of the State providing for the distraining and impounding animals found trespassing upon lands inclosed by a lawful fence, and in some other cases; and the proceedings to be had under the statute are specifically pointed out in the same enactment (*2 R. S., Part 3, ch. 8, tit. 10*).

CHAPTER XXXIV.

STATUTES OF THE SEVERAL STATES RESPECTING FENCES — LAWS OF MAINE — THE FENCE-VIEWERS AND THEIR POWERS AND DUTIES — RULES RESPECTING PARTITION FENCES — RAILWAY COMPANIES TO FENCE THEIR ROADS — DECISIONS OF THE COURTS UPON THE SUBJECT — LAWS OF NEW HAMPSHIRE — REGULATIONS CONCERNING PARTITION FENCES — CERTAIN PROVISIONS OF THE STATUTE SIMILAR TO THE MAINE STATUTES — DECISIONS OF THE COURTS ON THE SUBJECT OF FENCES.

THE statutes of the State of Maine provide for the election of two or more fence-viewers at the annual town meetings for each town, whose duties are also prescribed by statute (*Revised Statutes of 1871, title 1, chapter 3, § 10*). And in case no fence-viewers are found acting for reasons stated in the statute, then the selectmen of the town are required to act in that capacity (*R. S., tit. ch. 3, § 18*).

With respect to what are legal fences in the State, it is provided by statute that all fences which are four feet high and in good repair, consisting of rails, timber, boards or stone-walls; and brooks, rivers, ponds, ditches and hedges, or other things, which in the judgment of the fence-viewers having jurisdiction thereof are equivalent thereto, shall be accounted legal and sufficient fences. And the occupants of lands inclosed with fences are required to maintain partition fences between their own and the adjoining inclosures, in equal shares, while both parties continue to improve them. If any party neglects or refuses to repair or rebuild any such fence, the aggrieved party may complain to two or more fence-viewers of the town where the land is situated, who, after due notice to such party, must proceed to survey it, and if they determine that it is insufficient, they are required to signify it in writing to the delinquent occupant, and direct him to repair or rebuild it within such time as they shall judge reasonable, not exceeding thirty days. If the fence is not repaired or rebuilt accordingly, the complainant may make or repair it, and after notice given it has been adjudged sufficient by two or more of the fence-viewers, and the value thereof, with the fence-viewers' fees, certified under their hands, he may demand of the occupant or owner of the land, where the fence was deficient, double the value

and fees thus ascertained; and in case of neglect or refusal to pay the same for one month after demand, he may recover the same by an action on the case, with interest at the rate of one per cent a month, and if the delinquent owner or occupant repairs or rebuilds such fence without paying the fees of the fence-viewers, certified by them, double the amount thereof may be recovered by the complainant as before provided (*R. S., tit. 2, ch. 22, §§ 1-4*).

The statute of Maine, requiring partition fences to be divided in equal halves, does not require that the portion assigned to each owner should be contiguous. And where only a part of the line of a partition fence is in dispute, a division of that part by the fence-viewers, without noticing the part not in dispute, is held to be legal, under the statute (*Prescott v. Mudgett, 1 Shep. R., 423*). The statute in relation to partition fences, authorizes fence-viewers to assign distinct portions of the dividing line to the parties, and to fix the time within which the fence shall be built. Any direction beyond this is simply void, and does not invalidate their acts, so far as they had authority (*Longley v. Hilton, 34 Maine R., 332*). And it has been held that, under the statute, it is necessary that the portion of fence belonging to a delinquent owner, should first be adjudged by the fence-viewers insufficient or defective, and that the owner should have written notice from them of the fact, and be requested in writing to repair or rebuild it within the proper time, in order to entitle the adjoining owner to charge him with the expenses of rebuilding or repairing it himself. The court declared that the main objects of the third section of the statute was to divide the fence made or to be erected, and assign to each party his share; after which, the rights and duties of the parties are to be regulated by the other parts of the statute. And it was observed that the remedy given by the statute was cumulative, and did not affect the common-law remedy which an aggrieved party may have for damages sustained by neglect of the owner of fences to keep them in such repair as the statute requires (*Eames v. Patterson, 8 Greenl. R., 81; and vide Gooch v. Stephenson, 13 Maine R., 371*).

In order to render the decision of fence-viewers, in respect to the erection of a partition fence binding and conclusive upon the parties, the time limited by them, within which each adjacent owner shall build his part of the fence, must be definitely fixed. It has been held that a recital in the written assignment that a

certain owner named shall build the portion of fence assigned to him, "within twelve days from the date of receiving notice of this assignment," is not sufficiently definite (*Jones v. Tibbetts*, 60 *Maine R.*, 557). If the assignment of the fence-viewers as to partition fences is not recorded in the clerk's office in accordance with the provisions of the statute, one of the coterminous proprietors cannot maintain an action against the other for double the expense of building the fence (*Ellis v. Ellis*, 39 *Maine R.*, 526).

When the occupants or owners of adjacent lands disagree respecting their rights in partition fences, and their obligation to maintain them, on application of either party, two or more fence-viewers of the town where the lands lie, after reasonable notice to each party, may in writing under their hands assign to each his share thereof, and limit the time in which each shall build or repair his part of the fence, not exceeding thirty days. The assignment may be recorded in the town clerk's office, when it becomes binding upon the parties, and they are required thereafter to maintain their part of said fence. If such fence has been built and maintained by the parties in unequal proportions, and the fence-viewers adjudge it to be good and sufficient, they may, after notice as aforesaid, in writing, under their hands, award to the party who built and maintained the larger portion the value of such excess, to be recovered in an action on the case against the other party, if not paid within six months after demand. The parties to the assignment are required to pay the fees of the fence-viewers, in equal proportions; and if either neglects to pay his proportion within one month after demand, the party applying to the fence-viewers may pay the same, and recover in an action on the case of the delinquent party double the amount of his proportion of the fees. And in case any party refuses or neglects to build and maintain the part of the fence thus assigned him, it may be done by the aggrieved party; and he will thereupon be entitled to the double value and expense ascertained, and to be recovered as provided in the other cases stated (*R. S.*, tit. 2, ch. 22, §§ 5, 6).

All division fences are required to be kept in good repair throughout the year, unless the occupiers of adjacent lands otherwise agree. When, from natural impediment, in the opinion of the fence-viewers having jurisdiction of the case, it is impracticable or unreasonably expensive to build a fence on the true line between the adjacent lands, and the occupants disagree respecting its posi-

tion, on application of either party, as in other cases provided, and after notice to both parties, and a view of the premises, the fence-viewers may determine, by a certificate, under their hands, communicated to each party, on which side of the true line, and at what distance, or whether partly on one side and partly on the other, and at what distances, the fence shall be built and maintained, and in what proportions by each party; and either may have the same remedy against the other as if the fence was on the true line. And where adjacent lands have been occupied in common, without a partition fence, and either party desires to occupy his in severalty, or where it is necessary to make a fence running into the water, and the parties liable to build and maintain it disagree, either party may have the line divided in the same manner as in the other cases provided, except that the fence-viewers may allow a longer time than thirty days for building the fence, if they think proper, having regard to the season of the year. In other respects the remedy of the aggrieved party is the same as in the other cases referred to (*R. S., tit. 2, ch. 22, §§ 7-9*).

Where one party ceases to improve his land, or lay open his inclosure, he must not take away any part of his partition fence adjoining the next inclosure improved, if the owner or occupant thereof will pay therefor what two or more fence-viewers, on due notice to both parties, determine to be its reasonable value. And where any land which has been uninclosed is afterward inclosed, or used for pasturing, its occupant or owner is required to pay one-half of each partition fence on the line between his land and the inclosure of any other occupant or owner; and its value must be ascertained by two or more of the fence-viewers of the town where such fence stands, if the parties do not agree, and certified in writing; and after the value is thus ascertained, on notice to each owner or occupant, if he neglects or refuses for thirty days, after demand, to pay it, the proprietor of the fence may have his action on the case for such value, and the costs of ascertaining it. If the line on which a partition fence is to be made is to be divided, is the boundary between two or more towns, or partly in one town and partly in another, a fence-viewer must be taken from each town (*R. S., tit. 2, ch. 22, §§ 10-12*).

Where a fence between the owners of improved lands is divided, either by fence-viewers or by written agreement of the parties, recorded in the town clerk's office where the land lies, the owners

are required to erect and support it accordingly; but if any person lays his lands common and determines not to improve any part of them adjoining such fence, and gives six months' notice to all occupants of adjoining lands, he will not be required to maintain such fence while his lands so lie common and unimproved. The foregoing provisions of the statute are declared not to extend to house lots, the contents of which do not exceed half an acre; but if the owner of such lot improves it, the owner of the adjacent land must make and maintain one-half of the fence between them, whether he improves or not; and, further, the provisions of the statute are declared not to make void any written agreement respecting public fences (*R. S., tit. 2, ch. 22, §§ 13, 14*).

In order that the decision of fence-viewers, as to the sufficiency and value of a fence built by one party, may be binding and conclusive on the other party, so that an action will lie against him under the provision of the statute to recover double the value of the portion of the fence assigned to him, it is necessary that notice should be given him of the time and place of their meeting, that he may have an opportunity to appear before them to protect his own rights in the matter (*Harris v. Sturdivant, 29 Maine R., 366*). And the Supreme Court has subsequently held that an action authorized by the statute to recover double the price of building the defendant's part of a divisional fence, is prematurely brought, if commenced before the expiration of "one month after demand." And it was further held that, in an action under the statute, *indebitatus assumpsit* will not lie; it should be an action on the case, setting forth all the facts necessary to be established to fix the defendant's liability (*Sanford v. Haskell, 50 Maine R., 86*).

It has been declared by the Supreme Court of Maine, that the statute of the State respecting fences, is merely in affirmance of the common law; and that where there is no prescription, agreement or assignment, under the statute, whereby the owner of land is bound to maintain a fence, no occupant is obliged to fence against an adjoining close; but in such case, there being no fence, each owner is bound, at his peril, to keep his cattle on his own close. And where a tenant is bound by prescription, agreement, or assignment, under the statute, to maintain a fence against an adjoining close, it is only against such cattle as are rightfully in that close; and in such case, if the fence be not in fact made, the

owner of either close, thus adjoining, may distrain the cattle escaping from the adjoining close, and not rightfully there. The question was left in doubt, under a *quære* of the court, as to whether or not, to leave wild lands unfenced was an implied license for all cattle to traverse and browse them (*Little v. Lathrop*, 5 *Greenl. R.*, 357). And it has been more recently held by the same court that if, upon the line between adjoining lots of land, there has been no valid division, according to law, for the maintenance of a partition fence, the owner of each lot is bound to keep his cattle from crossing the line, and that it is a trespass, if the cattle of the one cross into the land of the other. And that this is the case, notwithstanding the occupants have previously built portions of the fence respectively, and the plaintiff has wrongfully removed a part of the fence built by the defendant, if there has been such a lapse of time as to give the defendant a reasonable opportunity of building a new fence (*Sturtevant v. Merrill*, 33 *Maine R.*, 62). To the same effect is a later case, in which it was held that, where there had been no statutory assignment of a partition fence, between two adjoining lots of land owned by different parties, or between those from whom they respectively derive their title, each is bound to keep his cattle on his own land at his peril (*Bradbury v. Gilford*, 53 *Maine R.*, 99). That is to say, the obligation to fence out cattle can arise only from a division of the fence by fence-viewers acting under the statute, or by a valid agreement in writing, between the owners of adjoining lots, or by prescription. This doctrine was laid down in a case, in which it appeared, that about thirty years before the trial, the dividing fence was built in separate portions by the owners, and was maintained by them and their privies in estate for more than twenty-five years; and the court held that the evidence was sufficient to warrant the presumption of a division by the parties (*Knox v. Tucker*, 48 *Maine R.*, 373). Under the statutes of Maine, it is held that sheep escaping from the land of their owner into contiguous land of another owner, cannot be impounded for doing damage, if no division had been made of the partition fence (*Webber v. Clossen*, 35 *Maine R.*, 26).

There is another statute of Maine, by which it is provided, that where buildings or fences have existed more than twenty years fronting upon any way, street, lane or land appropriated to the public use, the bounds of which cannot be made certain by records

or monuments, such buildings or fences shall be deemed to be the true bounds thereof. But when the bounds can be made certain, no time less than forty years will fix the boundary of the same (*R. S. of 1871, tit. 2, ch. 18, § 76*). And fences erected and maintained as above will not be regarded as nuisances (*R. S., tit. 2, ch. 17, § 10*).

The Supreme Court of the State has recently held, that the respective owners of adjacent lands, may become bound by prescription to maintain specific portions of their partition fences. But where there is no prescription, agreement or statute, no tenant is bound to fence against an adjoining close. This was so held upon authority (*Harlow v. Stinson*, 60 *Maine R.*, 347; and *vide Little v. Lathrop*, 5 *ib.*, 357).

The statutes of the State further declare that legal and sufficient fences are to be made on each side of land appropriated for a railroad, where it passes through inclosed or improved land, or wood lots belonging to a farm, before a construction of the road, and the railroad company is made liable to a penalty for neglecting to make or repair such fence (*R. S., tit. 4, ch. 51, §§ 20, 21*). Provision is also made by statute for proprietors of lands inclosed in common, regulating the subject of fencing their common lands, but as the same affects few persons except the parties interested in such lands in common, and they will most likely be informed in respect to the statute, it is unnecessary to give its provisions in this place (*R. S., ch. 22, §§ 15-39*). And there is also a provision of the Maine statutes, justifying the taking up and impounding animals found trespassing upon lands inclosed by lawful fences. And it has been held that the common-law right to impound cattle *damage-feasant*, is taken away in Maine by the statute of 1837, chapter 137. And it was further held that the lands of individuals, lying in common and uninclosed, cannot be understood to be "common lands," within the meaning of the statute (*Cutts v. Hussey*, 3 *Shep. R.*, 237). This rule makes it obligatory upon a party who undertakes to justify the taking up and impounding another's cattle, to show a full and entire compliance with the requisitions of the statute, or he becomes a trespasser *ab initio* (*Morse v. Reed*, 28 *Maine R.*, 481).

By the statutes of New Hampshire the owners of adjoining lands, under improvement, are required to build and repair the partition fence between them in equal shares; and any division of

such fence, made by the parties in writing, and recorded in the town records, is made binding upon the parties and their successors. Such division may also be established by usage and acquiescence of the parties, and those under whom they claim for twenty years. If the parties do not agree upon a division the fence-viewers, upon application, must make such division, which, when recorded in the town records, is made of the same effect as a division by the parties, and a copy of the record is made evidence (*Gen. Stat. of 1867, ch. 128, §§ 1-4*).

What is a legal and sufficient fence, is the same in all respects as is provided by the statutes of Maine, and the provisions of the New Hampshire statutes in respect to the insufficiency and repair of division fences upon the order of the fence-viewers, and the recovery of the delinquent party of double the value of the appraised value of the fence built by the other party, are substantially like the Maine law; and reference may be had to the latter statute for those provisions (*Gen. Stat., ch. 128, §§ 5-9*).

Where the owner of improved land, adjoining unimproved land of another, has built the line fence, he may demand and recover of the adjoining owner, when he begins to improve his land, the value of the part of the fence which he ought to build; and if they cannot agree upon the value, the fence-viewers may determine the same. And where the owner ceases to improve his land, or lays it out to common, he must not remove his fence; but he will not be bound to repair it so long as he allows it to remain unimproved or in common. If a party neglects to maintain a legal partition fence he cannot recover any damage which may accrue by reason of it, but will be bound to pay damage to others arising therefrom (*Gen. Stat., ch. 128, §§ 10-13*). The other provisions of the New Hampshire statutes are substantially like the Maine statutes upon the same subject; and it will be safe to consult the laws of that State for all needful information in connection with the statutes, the substance of which is here given, together with the points settled by the courts, and which follow this paragraph.

An application to the fence-viewers, under the New Hampshire statute, may include the division of the fence, its sufficiency, and the limitation of time to repair it or build a new one. But notice of an application for each must be given to the adverse party, and, unless the proceedings limiting the time of repair are valid,

the plaintiff cannot recover under the statute for building the defendant's part of the fence (*Fairbanks v. Childs*, 44 *N. H. R.*, 458). And under the statute providing that, upon the division of a fence by fence-viewers, the party making the application shall pay the fence-viewers for their services, and have an action of assumpsit against the other party for the one-half. No cause of action for such payment exists until after legal demand made; and a demand prior to payment is held to be insufficient. A demand, to be legal, must be made after payment, and by the party making the application, or his authorized agent or attorney; and in such a manner that opportunity is given to pay the sum demanded at the time of the demand. Where, after payment in such a case, the party making it left his claim with a legal firm for collection, who resided several miles from the parties, and in a different county, and the attorneys wrote the other party two letters, which were received, calling upon him to make the payment to them, the court held that such a demand by the attorneys was not a legal one (*Whittier v. Johnson*, 38 *N. H. R.*, 160). But in an action to recover one-half of the fees paid to fence-viewers, under the statute, it is not necessary for the party to show that the application for the division has been recorded. Such an action will not be defeated by its appearing that the application has not been recorded. And it is held that if three fence-viewers attend a hearing for the division of fences, a return, signed by two of them, is sufficient. In order to give the fence-viewers jurisdiction to make a division of fences, it is not necessary that there should be any positive disagreement between the parties. If they have not agreed upon a division and reduced it to writing, the fence-viewers may, upon application, make the division. And it is held that a division of partition fences cannot be shown by a prescription gained since the passage of the statutes of the State upon that subject, so as to prevent a division by the fence-viewers. But the doctrine was laid down that, before an action can be sustained for one-half of the fees paid to the fence-viewers for making a division of partition fences, the applicant must demand the same of the party sought to be charged. It is held that several separate fences may be included in one application to fence-viewers for a division; and if they are separately and distinctly divided, it will be no objection to the legality of a part, that others are improperly included in the application, nor any

objection to the payment of the fees for those legally divided (*Glidden v. Towle*, 11 *Foster's R.*, 147). In an action of assumpsit by a landowner against his neighbor, to recover the latter's portion of money paid to fence-viewers, the court held that, to support the action, it must appear that the division had been made on the representation of one or both the parties; that one of them had refused to pay the part awarded him to pay, and that the division had been made on the true line between them (*Gallup v. Mulvah*, 2 *Foster's R.*, 204). In one case, it appeared that the fence-viewers had made a division of a fence, and the action was brought to recover one-half the costs taxed by them. One of the board did not take the official oath till the day of hearing, but no objection was then made. The court held that this fact constituted no defense to the action. If it was a good objection, it should have been taken at the hearing. The court further held that it was not necessary that the fence-viewers should furnish copies of their report to the parties within one week after their decision, or that the items of their fees be specified in their report. Neither is it a good objection that the fence-viewers, in their report, order the part of the fence assigned to each party to be built by him, "and kept in repair by him, his heirs and assigns forever," as that would be only stating the legal effect of the division (*Gallup v. Mulvah*, *supra*). The duties of fence-viewers are chiefly judicial; and it has been held that proceedings before fence-viewers, one of whom was an uncle of one of the parties interested, were absolutely void (*Sanborn v. Fellows*, 2 2 *Foster's R.*, 473).

Where A.'s sheep escaped from his land into B.'s land, through the insufficiency of a fence which B. was bound to repair, and thence passed into another adjoining lot of B., which was surrounded by a sufficient fence, and committed damage, the Supreme Court held that B. could not maintain trespass therefor against A. (*Page v. Olcott*, 13 *N. H. R.*, 399). And it has been held that, when there has been a parol partition of a fence, executed by the parties, it cannot be revoked, except on application to the fence-viewers. A mere notice to the adjoining owner of a revocation is insufficient. And where, after such notice, cattle have escaped on to an adjoining close, through a defect of the fence of such adjoining owner, and have been taken *damage-feasant*, the court holds that replevin will lie to reclaim them (*York v. Davis*, 11

N. H. R., 241). The courts hold that it is the occupier and not the owner of a close, who is bound to keep the fences in repair. Where A. and B. owned adjoining closes which are not divided, each is bound to keep his cattle on his own land at his peril. But if C., with A.'s assent, keep his oxen in A.'s pasture, and has the custody of them there, and they stray in B.'s close, C., and not A., is to be considered, *quoad* the oxen, as the occupier of A.'s close, and is liable for the damage. Otherwise, if A. has the custody of C.'s oxen while they are in his close (*Tewksbury v. Bucklin*, 7 *N. H. R.*, 518).

Where adjoining owners had, in different places, built permanent fences, on what was supposed to be the true line between them, and each had occupied for more than twenty years up to such fences, it was held, that this did not entitle either party to hold by adverse possession, upon another part of the same line, where a temporary fence had been kept up, varying from the line of the permanent fences. But such permanent fences furnish evidence tending to show an agreement of the parties to establish a direct line between them; and this evidence may be left to the jury, with other circumstances, upon the question whether such agreement has in fact been made. But a bush-fence, maintained near the line, between the possessions of two adjoining owners, but not continued at all times in the same place, was held to be no evidence of an adverse possession, so as to bind either party to the line usually occupied by such fence (*Smith v. Hosmer*, 7 *N. H. R.*, 436). And the court also held that, where one of two owners of adjoining lots of land sees the other erect a permanent fence between their lands, without making any objection, this is evidence of an agreement on his part that the fence is erected on the true line (*Eaton v. Rice*, 8 *N. H. R.*, 378).

The Supreme Court of the State has held that the owner of a close is not obliged to fence against any cattle but such as are rightfully upon the adjoining land. And it was decided that this rule was not changed by the statute which provides that "the party neglecting to build or keep in repair any partition fence which he is bound to maintain, shall be liable for all damages arising from such neglect; and shall have no remedy for any damages happening to himself therefrom." The case before the court was this: The plaintiff and defendant were owners of adjoining closes, and had divided the partition fence between them, cattle,

belonging to third persons, which were wrongfully in the highway, strayed upon the defendant's close, and thence across that part of the fence which he was bound to maintain, and which was out of repair, upon the plaintiff's land, and damaged his crops. The court held, that the plaintiff could not maintain an action against the defendant for the damages (*Lawrence v. Combs*, 37 N. H. R., 331). The court also held in another later case, that under the statute, the duty of maintaining partition fences does not extend to the owners of public buildings erected on lands laid open to public use. And it would seem from the case that under this and similar statutes, the liability to fence is co-existent with the derivation of benefit therefrom (*Wiggin v. Baptist Society*, 43 N. H. R., 260).

It has been held by the Supreme Court that the statute of the State, which provides that if any person shall throw down or leave open any bar, gate or fence belonging to or inclosing of land holden in common, or belonging to any particular person, or shall aid therein, he shall for every such offense forfeit and pay treble damages to the person injured, and also a sum not exceeding fifteen dollars, according to the aggravation of the offense, is a penal statute, and debt, and not trespass, is the proper form of action founded thereon (*Janvrin v. Scammon*, 9 *Foster's R.*, 280).

Provision is made by the New Hampshire statute in respect to taking up and impounding animals trespassing upon lands lawfully inclosed. Under this statute, it has been held that, in order to justify a distress of cattle damage-feasant, it is not necessary to show that the land is inclosed, except as against an adjoining owner (*Drew v. Spaulding*, 45 N. H. R., 472). The party making the distress in all cases under the statute, must see to it that his proceedings are all regular and legal, or he may be made liable as a trespasser (*Cate v. Cate*, 44 N. H. R., 211).

In conclusion, it may be added, that the Supreme Court of the State has held, that in New Hampshire, railroad corporations are required by statute to maintain fences along the sides of their roads (*Dean v. Sullivan Railroad Company*, 2 *Foster's R.*, 316).

CHAPTER XXXV.

STATUTES OF THE SEVERAL STATES RESPECTING FENCES—LAWS OF VERMONT—RULES RELATING TO PARTITION AND OTHER FENCES—RAILROAD CORPORATIONS REQUIRED TO FENCE THE SIDES OF THEIR ROADS—DECISIONS OF THE COURTS RESPECTING FENCES IN THE STATE—LAWS OF MASSACHUSETTS—RULES RELATING TO PARTITION FENCES, AND THE DECISIONS OF THE COURTS CONCERNING THE SAME.

IN the State of Vermont the statute makes all fences four and a half feet high and in good repair, and the same barriers indicated by the statutes of Maine, legal and sufficient; and owners of land bordering on highways are not bound to maintain fences upon such highways. Owners of adjoining lands are required to make and maintain equal portions of the division fence between their respective lands, except either owner chooses to let his lands lie vacant. Where the owner of uncultivated, unimproved and unoccupied lands chooses to let his land lie open and common, he is not required to fence the same, unless the adjoining owner occupies his land; and then the other owner is compelled to fence his land, except the selectmen of the town decide that he ought to be excused from building any portion of the division fence; and the selectmen are to decide what constitutes uncultivated land, not properly belonging to a farm, and all questions relating to the same. In cases where the owners of land are not required to maintain the division fence, each one will be liable for any damage by reason of any animal straying from his lands and taken on the occupied lands of others. Persons required to maintain a division fence, who may neglect to keep the same in repair, are liable for damages done to the opposite party in consequence of such neglect; and any person sustaining such damages, on giving ten days' notice to the party who ought to maintain the fence, may put the fence in repair and collect the value of the same, with the damages of the delinquent party.

Whenever the lands of adjoining owners are suffered to lie without a division fence, neither party can legally pasture his lands until the parties have agreed to occupy in common; and if the parties cannot agree as to occupying the lands in common, the fence-viewers must decide the same upon the application of either

party. In case adjoining owners of lands, so situated that the division fence cannot be built on the line, cannot agree as to the place where the fence shall be built, application may be made to the fence-viewers of the town, who must fix the same. Whenever an owner of adjoining lands chooses to occupy his land, and the other chooses to let his lie vacant, he may build the whole division fence; and when the opposite party shall commence to occupy his land, he is required to pay for his portion of the fence.

In case a division fence shall be suddenly destroyed by fire, winds or floods, the person who ought to rebuild or repair the same must do so within ten days after being notified for that purpose; and in the mean time he will be liable for damages done by estrays. Parties may agree in writing in respect to their division fences; but the agreement must be witnessed by two witnesses, and acknowledged. Fence-viewers are required to examine fences on request of any party interested, under a penalty for neglect. Where the line of adjoining owners is a town line, and such owners cannot agree as to the division fence, the same must be determined by a board of fence-viewers from the two towns. This is the substance of the statute of Vermont upon the subject of fences, although the details of proceeding are omitted (*Gen. Stat. of 1863, ch. 102*). Railroad corporations are required to maintain legal fences on the sides of their road, where necessary; and, until such fences are built, they are liable to pay all damages occasioned by want of the fences. This provision, however, does not apply to a case where the landowner has been paid for fencing the road and has agreed with the company to maintain the fences (*Gen. Stat., ch. 28*).

The Supreme Court of Vermont has decided, in accordance with the general tenor of the authorities, that, at common law, the owner of a close was not obliged to fence against the cattle of the occupant of an adjoining close; and that the statute of the State, imposing the duty on adjoining proprietors of land to erect and maintain fences, recognized the same principle; for the object and design of fencing is not to keep the cattle of others off the premises, but to keep at home the cattle of the occupant. It was declared that this principle has equal application to the owners of land adjoining public highways; and where no statutes exist, and no obligation is imposed by covenant or prescription, a railroad company is not bound to fence its land (*Hurd v. The Rutland*

and *Burlington Railroad Company*, 25 *Vt. R.*, 116). And the same court has decided that the owner of improved land may use all lawful means within his power to enforce his right to exclusive possession of his land, although the land may not be surrounded by a legal fence. And the court held that if cattle trespass upon improved land, which is not surrounded by such fence as is required by statute, the owner of the land may drive them off and may, for this purpose, set a dog upon them, provided he is not in any way wanting in ordinary care and prudence, arising from the size and character of the dog, or in the manner of setting him upon the cattle and afterward pursuing them (*Clark v. Adams*, 18 *Vt. R.*, 425).

In a late case before the Supreme Court, it appeared that the plaintiff, H. and the defendant had uncleared and unoccupied lots lying near together. The lot of H. lay between the plaintiff's and defendant's lands. There was an old, but not a legal fence between the plaintiff's and H.'s, and between H.'s and the defendant's lots. The defendant had a fence west of his lot; the others had none. The defendant's sheep escaped from his lot, crossed over the lot of H. into the plaintiff's, and did the damage complained of. The court held, that the plaintiff could recover in trespass; the defendant being under obligation to restrain his animals, so as to prevent their going astray and doing damage; and the plaintiff not being an adjoining proprietor, was not bound to fence against the defendant's animals (*Wilder v. Wilder*, 33 *Vt. R.*, 678). In a still later case, the same court held, that a declaration in an action on the case alleging that the plaintiff and the defendant were owners and occupiers of adjoining lands, that the defendant was under obligation to keep up a legal division fence between them, that he neglected to do so, and in consequence of such neglect, the defendant's mare passed over the fence and injured the plaintiff's horse by kicking, the gist of the action was not that of trespass. And it being proved that there had never been any repudiation of an agreement between the parties each to build and maintain respective portions of the division fence, the plaintiff, failing to show that the mare passed over the defendant's portion of the fence, was not entitled to recover. It was declared that the gist of the action was the defendant's obligation and neglect to keep up the fence (*Tupper v. Clark*, 43 *Vt. R.*, 200).

It seems that under the statute relating to fences, it is not a

prerequisite to the recovery of damages occasioned by the neglect of one party to build or maintain his share of a legal division fence, that the other party should first build or repair the fence, after ten days' notice to the party in default. The liability of a party for such neglect, is not restricted to injuries connected with the use of the other party's land, but extends to all damages which may fairly be said to be the legal and natural consequence of such neglect. In the case before the court, it appeared that A. and B. were adjoining proprietors, and had divided their division fence, one part to be maintained by one, and the other part by the other. In consequence of the neglect of B. to maintain his portion of the fence, A.'s horses escaped through that portion upon B.'s land, where they were gored by B.'s bull. The court held, that the fact that A.'s portion of the fence was insufficient did not constitute a bar to his recovery of damages for this injury. It was also held in an action on the case in favor of A. against B., for the recovery of such damages, that the court should leave it to the jury to find whether they were the natural consequence of B.'s neglect to maintain his portion of the fence, and such as under the circumstances he might reasonably expect would follow therefrom, and unless they should find them to be such, the plaintiff could not recover (*Saxton v. Bacon*, 31 *Vt. R.*, 540).

If land within the surveyed limits of a public highway be inclosed by an individual and occupied by him constantly for more than twenty years, under a claim of right, he will acquire a prescriptive right to the land so occupied, as against the public, and can maintain trespass against the selectmen of the town, who remove his fence to the original line of the highway. This doctrine was so held in a well-considered case before the Supreme Court of Vermont, some twenty years ago (*Knight v. Heaton*, 22 *Vt. R.*, 480).

The Supreme Court of the State has held, that a justice of the peace has not jurisdiction under the statutes of Vermont, of an action on the case, brought by a landowner, under the provisions of chapter 89 of the Revised Statutes, against the owner of adjoining land, to recover the expense of building that part of the division fence between them, which the fence-viewers have assigned to the defendant as his proportion thereof. And it was further held in the same case, that fence-viewers have no authority to settle the rights of different claimants of land, or to establish

disputed boundaries; and that neither party is precluded by their decision, from contesting the question of ownership in himself, or in the adverse party, or the location of their boundaries (*Shaw v. Griffin*, 22 *Vt. R.*, 565).

By the statutes of Vermont any person may impound any beast found in his inclosure doing damage (*Gen. Stat.*, *ch.* 100, § 4). Under this statute, it has been held that in order to constitute an inclosure contemplated by its provisions, it is not necessary that the fence should be such as is described in the general statutes relating to fences (*Keith v. Bradford*, 39 *Vt. R.*, 34; *vide also Davis v. Campbell*, 23 *ib.*, 236). But it has been held that the meaning of "inclosure" in the statute, is occupied land, and the right to impound cattle, extends only to such as are trespassing on inclosed lands (*Porter v. Aldrich*, 39 *Vt. R.*, 326).

By the General Statutes of Massachusetts it is provided that fences four feet high and in good repair, consisting of rails, timber, boards or stone, and brooks, rivers, ponds, creeks, ditches and hedges, or other things which the fence-viewers (within whose jurisdiction the same shall lie) shall consider equivalent thereto, shall be deemed legal and sufficient. And the respective occupants of lands inclosed with fences are required, so long as both parties improve the same, to keep up and maintain partition fences between their own and the next adjoining inclosures in equal shares (*Gen. Stat.*, *ch.* 25, §§ 1, 2).

The Supreme Judicial Court of the State has held, in accordance with the rule of the common law, that where a party is not bound by prescription, agreement, or assignment of fence-viewers, to maintain a fence between his land and that of an adjoining owner, he may sustain an action of trespass, *quare clausum fregit*, against the adjoining owner, whose cattle escape into his land. The court held that the common law on this point is not altered by the statutes of the commonwealth (*Thayer v. Arnold*, 4 *Met. R.*, 589). It has also been held by the same court that an occupant of land, who is bound to maintain a fence between his own and an adjoining inclosure, may place half of the fence, of reasonable dimensions, on the land of the adjoining owner; and that he may also cut half of a ditch on the land of such owner, where a ditch is proper for a partition fence (*Newell v. Hill*, 2 *Met. R.*, 180; *but vide Sparhawk v. Twitchell*, 1 *Allen's R.*, 450). In a case before the Supreme Judicial Court of the State, it appeared

that the owner of a tract of land conveyed a portion of it to the inhabitants of the town in which it lay, by a deed, with this clause: "And it is for the use of a burying-place; if the above described land is to be inclosed with a fence, the same is to be done by the inhabitants aforesaid." The town accepted the deed and built a division fence, but did not keep it in repair; and in consequence of this neglect the cattle of the person in possession of the contiguous land escaped therefrom into the burying-place, and thereupon the town impounded them. The court held that the town, by accepting the deed, was bound to maintain the fence, and that the impounding, under the statute, was unlawful, as the escape was through the neglect of the town, within the true meaning of the statute (*Minor v. Delano*, 18 *Pick. R.*, 266). But the same court held, in a later case, that the fact that the proprietors of a railroad have erected fences along the line of their road, against the land of a particular individual, is not of itself evidence of any obligation on the part of the proprietors to make or maintain fences for the benefit of such person (*Morse v. The Boston and Maine Railroad*, 2 *Cush. R.*, 536).

The statute further provides that, if a party refuse or neglect to repair or rebuild a partition fence which he ought to maintain, the aggrieved party may complain to two or more fence-viewers of the place, who, after due notice to each party, shall survey the same; and if they determine that the fence is insufficient they shall signify the same in writing to the delinquent occupant, and direct him to repair or rebuild the same within such time as they judge reasonable, not exceeding fifteen days; and if the fence shall not be repaired or rebuilt accordingly, the complainant may make or repair the same. When a deficient fence, built up or repaired by a complainant, as thus provided is, after due notice to each party adjudged sufficient by two or more of the fence-viewers, and the value thereof, with their fees ascertained, by a certificate under their hands, the complainant may demand, either of the occupant or owner of the land where the fence was deficient, double the sum so ascertained; and in case of neglect or refusal to pay the same so due, for one month after demand, he may recover the same, with interest at one per cent a month, in an action of contract (*Gen. Stat.*, *ch.* 25, §§ 3, 4).

Where the fence-viewers, upon the application of one party, but without notice to the other, appraise the value of the latter's por-

tion of a fence, which has been erected by the former in consequence of the latter's neglect to erect the same, such appraisement is held to be void as against the party in default. In the case before the court it appeared that the plaintiff had, in consequence of the neglect of the defendant, erected the portion of a division fence, which was allotted to the defendant by the fence-viewers, and the fence-viewers afterward, on the application of the plaintiff, but without notice to the defendant, appraised the value of such fence, and the plaintiff brought his action to recover double the amount of such valuation, in pursuance of the statute. The court held that the appraisement was void as against the defendant (*Scott v. Dickinson*, 14 *Pick. R.*, 276). This decision was made when the statute did not expressly require notice of the appraisement to be given to the delinquent party. The present statute requires "due notice to each party," to be given by the fence-viewers, before they proceed to make the appraisal; so that now there would seem to be no question as to the appraisement without due notice to the delinquent party.

It seems that, under a complaint that a fence is out of repair, fence-viewers have no authority to assign to each of the owners of adjoining land his respective share of the fence, and to direct the building thereof within a specified time; and no action will lie upon an award of fence-viewers under the foregoing provision of the statute, unless the fence-viewers have previously adjudicated that the existing fence was insufficient and illegal, and that the fence which the plaintiff has rebuilt is sufficient (*Sears v. Charlemont*, 6 *Allen's R.*, 437).

The statute further provides that, where a controversy arises about the rights of the respective occupants in partition fences, and their obligation to maintain the same, either party may apply to two or more fence-viewers of the places where the lands lie, who, after due notice to each party, may, in writing, assign to each his share thereof, and direct the time within which each party shall erect or repair his share, in the manner before provided; which assignment, being recorded in the city or town clerk's office, is made binding upon the parties and upon the succeeding occupants of the lands, who are required thereafter to maintain their respective parts of such fence. And if a party refuses or neglects to erect and maintain the part of a fence assigned to him by the fence-viewers, the same may, in the manner before provided,

be erected, and an action maintained by an aggrieved party ; and he will be entitled to double the value thereof, ascertained and recovered in the manner aforesaid (*Gen. Stat.*, *ch.* 25, §§ 5, 6).

The Supreme Judicial Court of the State, has held, under this provision of the statute, that an assignment by fence-viewers of only a part of a continuous line of partition fence is not for that reason invalid, neither party at the time requesting that the whole line be divided. And it was declared that, after such assignment has been duly made, the obligations of the parties are fixed to maintain the fence accordingly, and cannot be changed, without consent, by a subsequent view and division by the fence-viewers of the whole continuous line of partition fence (*Alger v. Pool*, 11 *Cush. R.*, 450). But the court has decided that, in an action under the statute, to recover double the value of a partition fence erected by the plaintiff after the defendant's refusal to erect it, it is necessary to prove that the fence-viewers gave the defendant notice of their meeting, before they adjudged the fence sufficient, and appraised the value thereof. It was held, however, that such adjudication and appraisal are one transaction, and are to be made at the same time ; that is to say, it is not necessary that the fence-viewers should give the defendant a separate and distinct notice of the two purposes of their meeting. It was further held that, when a plaintiff, who has erected a fence which the defendant has refused to erect, demands of the defendant double the sum ascertained and certified by the fence-viewers as the value of such fence, and also demands the fence-viewers' fees, which are not legally taxed, the demand for each item is in its nature several, and the demand for the fees does not render void the demand for the other sum (*Lamb v. Hicks*, 11 *Met. R.*, 496). In an action on the statute to recover double the value of a partition fence erected by the plaintiff, after the refusal of the defendant to erect it, the defendant cannot defeat the claim, by showing that an assignment of his share of the fence in question was made by fence-viewers under a mistaken belief of himself and the plaintiff as to the true division line of their lands, and that a part of the land on which the fence was made was afterward adjudged to be the property of the plaintiff. It seems that in such action, the adjudication, by the fence-viewers, that the fence erected by the plaintiff is sufficient, is conclusive on the defendant, and cannot be impeached by evidence tending to show that the fence was insufficient. Nor

will the defendant be permitted to show in defense, that the plaintiff's own fence was insufficient when he applied to the fence-viewers to survey the defendant's fence, and determine as to its sufficiency (*Baker v. Lakeman*, 12 *Met. R.*, 195).

When in a controversy between adjoining occupants as to their respective rights in a partition fence, it appears to the fence-viewers that either of the occupants had, before any complaint made to them, voluntarily erected the whole fence, or more than his just share of the same, or otherwise become proprietor thereof, the statute provides that the other occupant shall pay the value of so much thereof as may be assigned to him to repair or maintain, to be ascertained and recovered as provided in the said chapter 25. And the statute requires partition fences to be kept in good repair throughout the year, unless the occupants of the lands on both sides shall otherwise agree (*Gen. Stat.*, ch. 25, §§ 7, 8).

The proceedings to ascertain the value of the portion of the fence in this paragraph referred to, are pointed out in sections four and six of the statute, the provisions of which have been hereinbefore given. So that the principles settled by the court in the case of *Lamb v. Hicks* (11 *Met. R.*, 496), will be applicable in a case arising under section eight of the statute.

Where lands of different persons which are required to be fenced, are bounded upon or divided from each other, by a river, brook, pond or creek, if the occupant of the land on one side refuses or neglects to join with the occupant of the land on the other side in making a partition fence on the one side or the other, or shall disagree respecting the same, then two or more fence-viewers of the place or places wherein such lands lie, on application made to them, are required by the statute, forthwith to view such river, brook, pond or creek; and if they determine the same not to answer the purpose of a sufficient fence, and that it is impracticable to fence on the true boundary line without unreasonable expense, they are then required, after giving notice to the parties to be present, to determine how, or on which side thereof, the fence shall be set up and maintained, or whether partly on one side and partly on the other side, as to them may appear just, and to reduce their determination to writing; and if either of the parties refuses or neglects to make and maintain his part of the fence according to the determination of the fence-viewers, the same may be made and maintained as before provided, and the

delinquent party is made subject to the same costs and charges to be recovered in like manner (*Gen. Stat., ch. 25, § 9*).

The Supreme Judicial Court of the State has held, that a partition fence on land that is covered, a part of the year, with the waters of an artificial mill-pond, but is occupied and used as pasture or mowing land during another part of the year, is not a water fence, within the meaning of the statute (*Lamb v. Hicks, 11 Met. R., 496*).

The statute further provides that, where lands belonging to two persons in severalty have been occupied in common without a partition fence between them, and one of the occupants desires to occupy his part in severalty, and the other occupant refuses or neglects on demand to divide the line where the fence ought to be built, or to build a sufficient fence on his part of the line when divided, the party desiring it may have the same divided in the manner provided in the same chapter, and the fence-viewers may in writing assign a reasonable time, having regard to the season of the year, for making the fence; and if the occupant complained of does not make his part of the fence within the time assigned, the other party may, after having made up his part of the fence, make up the part of the other, and recover therefor double the expense thereof, together with the fees of the fence-viewers.

Where a division fence between the owners of improved lands has been made either by fence-viewers or under an agreement in writing between the parties, recorded in the office of the clerk of the town or city, the several owners of such lands and their heirs and assigns must erect and maintain such fences, agreeably to such division; but if one party lays his lands common and determines not to improve them, on giving the other party six months' notice of such determination, he will not be required to support such fences during the time that his lands lie common and unimproved.

When one party ceases to improve his land or lays open his inclosure, he must not take away any part of the partition fence belonging to him, and adjoining to the next inclosure, provided the other party will allow and pay for his part of such fence, and where lands which have lain uninclosed are afterward inclosed or used for depasturing, the owner or occupant of such lands must pay for one-half of such partition fence, to be ascertained by two or more fence-viewers, if the parties do not agree. Provision is also made for locating water fences (*Gen. Stat., ch. 25, §§ 10-15*).

It seems that the liability of the owner or occupant of land, which has lain uninclosed, on inclosing or depasturing the same, to pay for the one-half of a partition fence, under the statute, attaches immediately upon such inclosing. And the right of an owner, who has erected a partition fence, to recover the value of one-half thereof, against the owner of adjoining land, is complete by the commencement of proceedings to have the value of such half ascertained by fence-viewers, and cannot be defeated by a sale of the land, and a notice by the purchaser, that he does not intend to occupy, or improve, or inclose it, subsequent to the application of the fence-viewers, and notice of such application by them to the original owner, though previously to any further proceedings by them (*Field v. Proprietors, etc.*, 1 *Cush. R.*, 11). By a special act of the General Court, the depasturing simply of uninclosed lands upon the island of Nantucket, does not render the owner or occupant liable for the erection of a partition fence (*Laws of 1847, ch. 102*).

There are also full provisions of the statute in respect to distraining and impounding cattle doing damage upon the lands of any person that are inclosed with a legal and sufficient fence, and the remedies and proceedings in such cases are plainly prescribed (*Gen. Stat.*, ch. 25, §§ 18 *et seq*; and *vide Dexter v. Bruce*, 4 *Gray's R.*, 345).

The statutes of Massachusetts have an additional provision to the effect, that the fence-viewers may determine whether a partition fence is required between the lands of the respective occupants, and where the division line is in dispute or unknown, they may designate a line on which the fence shall be built, and may employ a surveyor therefor, if necessary; and for the purposes of maintaining a fence, such line will be deemed the division line, until it shall be otherwise determined by judicial proceedings. And if, after a fence has been built upon the line thus designated, it shall be judicially determined that the true division line is in another place, each occupant is required to remove his part of the fence to, and rebuild it upon such line; and in case either party shall refuse or neglect to remove and rebuild his share of the fence, the other may apply to the fence-viewers, the same as in the other cases provided, with the like effect (*Supplement to Gen. Stat.*, ch. 190). There are certain unimportant provisions in respect to the election and fees of the fence-viewers, which it is

deemed unnecessary to note, as the statute is simple, and will likely be well understood by those officers, who have a personal interest in the subject.

Under the statute providing that any person injured by cattle in his lands, "that are inclosed with a legal and sufficient fence," may maintain trespass against the owner of the cattle, or distrain them, it was held by the Supreme Judicial Court, that, where cattle unlawfully going at large in a highway broke into a close adjoining thereto, the owner of the land was entitled to such remedies, although the land was not inclosed with a sufficient fence against the highway, he not being bound to fence against cattle unlawfully at large in the highway. And it was decided that, where cattle break into a close, the owner of the close has a remedy under the process of distress for damage done by the cattle to personal property therein. The court also declared, that appraisers appointed to estimate the damage done by cattle distrained *damage-feasant*, are not limited to the amount of damages claimed by the owner of the close in the notice of distress given by him to the owner of the cattle. The owner of the close having impounded a horse doing damage therein, sent a notice to the owner of the horse, containing these words: "I have taken up as an estray, doing damage in my inclosure, a horse belonging to you," "and my damages are six dollars." The court held, that a sale of the horse, in the manner prescribed by statute, in the case of animals taken up *damage-feasant*, was nevertheless valid, the word "estrays" not being used technically in such notice (*Lyman v. Gipson*, 18 *Pick. R.*, 422).

Where a jury were instructed, that towns were not ordinarily bound by law to fence their roads, but were afterward instructed, that towns were bound to erect fences or railings at places which would otherwise be unsafe or inconvenient for travelers exercising ordinary care, the Supreme Judicial Court held that there was no legal exception to the instruction (*Collins v. Dorchester*, 6 *Cush. R.*, 396).

CHAPTER XXXVI.

STATUTES OF THE SEVERAL STATES RESPECTING FENCES — LAWS OF RHODE ISLAND — LAWFUL FENCES THEREIN — RULES RELATING TO PARTITION FENCES — RULES RELATING TO WATER FENCES — LAWS OF CONNECTICUT — RULES IN RESPECT TO LINE OR PARTITION FENCES — DECISIONS OF THE COURTS UPON THE SUBJECT — FENCES ALONG THE SIDES OF RAILWAYS — RULE RESPECTING FENCING OF HOMESTEAD — FENCING OF COMMON LANDS.

IN the State of Rhode Island the following are declared to be lawful fences, viz.: A hedge with a ditch three feet high upon the bank of the ditch, well staked, at the distance of two feet and a half, bound together at the top, and sufficiently filled to prevent small stock from creeping through; and the bank of the ditch not less than one foot above the surface of the ground. A hedge without a ditch is required to be four feet high, staked, bound and filled, as a hedge with a ditch; a post and rail fence on the bank of a ditch four rails high, each well set in posts, and not less than four feet and a half high; a stone-wall fence four feet high, with a flat stone hanging over the top thereof, or a good rail or pole thereon, well staked or secured with crotchets or posts; a stone wall without such flat stones, rails or posts on the top is required to be four feet and a half high; and all other kinds of fences are required to be four feet and a half high.

All partition fences are required to run on the dividing line, and the owners have the right to place one-half of the width thereof on the land of each adjoining proprietor. Such fences are to be kept up and maintained in good order through the year, unless the parties concerned otherwise agree. Partition fences between lands under improvement must be made and maintained in equal halves, in length and quality, by the respective proprietors. Where a proprietor shall improve his land, the land adjoining being unimproved, he must make the whole partition fence; and when the adjoining proprietor or possessor shall afterward improve his land, he is required to pay for one-half of the partition fence, according to the value thereof at that time; and thereafter both proprietors are required to maintain their respective proportions of the line fence, whether they shall continue to improve their lands or not.

Coterminous owners or possessors of land adjoining water, whenever their land is under improvement, are required to make and maintain a sufficient water fence to prevent trespass of each other's cattle, in the same manner as other partition fences are directed to be made. In all cases where partition fences are erected by the agreement of the parties in interest, or other lawful manner, the proprietors of the fences, their heirs or assigns, may hold and improve the same without molestation, and will be excused afterward from making other fence on such dividing, except by the special agreement of the parties to the contrary. All agreements in regard to division fences are required to be registered in the town clerk's office. All tracts of marsh land, so situated and exposed to the flow or wash of the sea as to render it impracticable for the several owners thereof to keep up partition fences around the respective shares or lots, are exempted from the operation of the statute in respect to partition fences; but remedies are prescribed in cases of trespasses on such lands. In cases of controversy in respect to partition fences, and the right of the parties therein, or their obligations to maintain the same, the same is to be settled by a fence-viewer of the town; and the proceedings thereon are all definitely pointed out by the statute (*Gen. Stat. of 1872, ch. 94*).

It has been held by the Supreme Court of the State that, upon an application to a fence-viewer of a town, under the statute, to settle a controversy about the rights of occupants of land in partition fences, and their obligation to maintain the same, all that the fence-viewer can do is, after due notice, to determine the rights of the respective parties, by assigning to each his share of the fence, and to direct the time within which each shall erect or repair the same; and it was declared that such fence-viewer could not, upon such application and notice, proceed to mulct either party for neglecting or refusing to obey his order. And it was further decided that, to warrant the proceedings under the fifth section of the statute, it is necessary that there should be a complaint to the fence-viewer of the neglect or refusal by an occupant to rebuild or repair his share of a partition fence, and a determination by the fence-viewer, after due notice to the party complained against, that the complaint is true, and an assignment of time within which the neglecting party may perform his duty; and although no notice is in terms required by the statute to be given to the delin-

quent occupant, when, under the provisions of the sixth section, the fence-viewer proceeds to ascertain the cost to the complainant of rebuilding or repairing the fence, yet such notice is required by the principles of natural justice, and the judgment and certificate of the fence-viewers will be void without it (*Franklin v. Wells*, 6 R. I. R., 422).

The Supreme Court of the State has, also, recently held that a town is not ordinarily bound to fence its roads; and where a highway connected with a private way, and there was a defect in the private way some fifty to one hundred feet from the junction of the two ways, it was held that the town was not liable for an accident happening to one who drove off by mistake upon the private way, and was injured by reason of such defect, although there was no fence or other mark to show the deviation of the private way (*Chapman v. Town Treasurer of Cumberland*, 10 R. I. R., ; S. C., 8 Alb. L. J., 267).

By the statutes of Connecticut the proprietors of lands are required to make and maintain sufficient fence or fences to secure their particular fields and inclosures; and a rail fence four feet and a half high, a stone wall four feet high, well and substantially erected, and any other fence, either of rails, boards, hedge, ditch, brooks, rivers or creeks, which, in the judgment of fence-viewers, shall be equal to a rail fence four feet and a half high, will be deemed a sufficient and lawful fence (*Revised Statutes of 1866, ch. 21, § 1*).

The Superior Court of the State, as early as 1791, declared the duty of proprietors of adjoining lands where the line is such that no fence can be made, and decided that, where a private river divided between adjoining proprietors, no division fence could be made in the line, and hence the case should be ruled by principles of reason and justice. The court accordingly held that the owner of cattle in such case was required to so keep them as to prevent their injuring the property of others (*Bissell v. Southworth*, 1 Root's R., 269). There is now, however, a statute upon the subject, by which it is provided that where the dividing line between adjoining proprietors shall be a river, brook, pond or creek, which is not a sufficient fence, and it is impracticable to make the fence in the line, if either party shall refuse to make a divisional fence on one side or the other, then either two of the selectmen of the town shall, on application of either party, desirous of making such

fence, determine on which side thereof the fence shall be erected and maintained, or whether partly on one side and partly on the other, and what part each shall make and maintain, and deliver their determination in writing to the parties; and if either of the parties shall refuse to make and maintain his part of the fence, the other may proceed as is provided in the act (*R. S., ch. 21, § 6*).

Where adjoining proprietors inclose their land in severalty, each is required to make and maintain one-half of the divisional fence; and where adjoining proprietors make a divisional fence of posts and rails, boards, or a hedge fence, each will be allowed twelve inches from the dividing line to break the ground to set in the posts and stakes; but the posts are required to stand in the dividing line; and, in making a stone wall or other straight fence, each proprietor will be allowed to set one-half of the width on each side of the dividing line, upon the land of the adjoining proprietor; and, in making a worm or crooked rail fence between adjoining proprietors, each proprietor will be allowed to set one-half of the width on each side of the dividing line, upon the land of the adjoining proprietor, provided it does not exceed three feet from the division line; and except, in case of house or home lots, four feet will be allowed for a ditch from the dividing line; but the party making the ditch is required to lay the bank upon his own land (*R. S., ch. 21, § 2*).

The Supreme Court of Errors of the State decided, in 1827, that, where a party, having made a ditch six feet wide through his land, conveyed a part of such land, bounding the grantee *on* the ditch, the grant extended to the center of the ditch; and that, in such case, the ditch was to be treated as a common fence, subject to be repaired by either party, preserving its width. But, in making repairs, it was decided that one party has not, by law, a right to break and dig up the ground four feet from the center on to the other's land, throwing on to his own land, as a bank, the earth so dug up (*Warner v. Southworth, 6 Conn. R., 471*).

The Supreme Court of Errors have impliedly decided what is a divisional fence within the statute. In the case before the court, it appeared that the plaintiff and defendant owned adjoining lands fronting on a street; there was no fence on the line between the parties. The defendant, in erecting his front fence on the line of the street, which was coincident with the plaintiff's front line, placed a post on the end of the dividing line next the street,

so that part of it stood on the plaintiff's land and part on the defendant's land. The court held that the defendant was not erecting a divisional fence, but his own front fence; and as the statute relating to fences is applicable to divisional fences only, the defendant was not protected by that statute, and, of course, was liable as a trespasser. Storrs, J., who delivered the opinion of the court, regarded the case as one of very considerable practical importance, especially in thickly settled places, where the owners of adjoining lands might choose to erect different kinds of fences in front of them; and it was thought that much conflict, injustice and inconvenience might ensue from the adoption of the contrary principle. All the other judges ultimately concurred in this view, although Hinman, J., had a different impression of the law at first (*Hubbell v. Peck*, 15 Conn. R., 133, 136).

If one proprietor shall first occupy his land, and make the whole fence, and afterward the adjoining proprietor shall occupy the adjoining land, by particular inclosure, the statute provides that the latter shall purchase one-half of the divisional fence, and maintain the same; and if the parties do not agree in dividing and appraising such fence, the party aggrieved may call on the selectmen of the town, or a major part of them, who may divide and set out to each party, his equal proportion of said fence, and determine how much the party last occupying shall pay for the fence to the party erecting the same; the account of which, under the hands of the selectmen, is made sufficient evidence for the party who erected said fence, to recover the same from the party last occupying as aforesaid (*R. S.*, ch. 21, § 3).

The Supreme Court of Errors have decided that a parol partition of a divisional fence, by adjoining proprietors, is valid (*George v. Shatton*, 29 Conn. R., 421). And the same court have decided that the fence-viewers are the sole judges in questions respecting the sufficiency of fences, and are to decide, by direct examination, without any formal hearing, or trial, whether an existing fence is or is not such as the statute requires (*Fox v. Beebee*, 24 Conn. R., 271).

It is also provided by statute that whenever there has been a fence between adjoining proprietors, which has never been divided, and either party refuses to divide the same, the other party may call on the selectmen to make a division, and the selectmen are required to set out the better part, if any there be, to him who

erected it, or holds under him who erected it; and the cost must be paid by the party who willfully refuses to make such division, to be recovered, in a proper action, by the other party; and a certificate of the amount of such cost, under the hand of the selectmen, is made sufficient evidence; and the division of fences made as thus provided, and recorded in the records of the town where the land lie, will be valid and binding on the parties (*R. S., ch. 21, § 4*).

If any person, who ought to maintain any divisional fence, shall refuse or neglect to keep it in sufficient repair, the party aggrieved may call on the fence-viewers, to view the same, and if they find such fence to be insufficient, they are required, without delay, to give notice, in writing, of such insufficiency, to the person or persons who are bound to repair it; and if he or they do not, within fifteen days, put the same in sufficient repair, then the party aggrieved may do it; and where the same shall be completed, and judged sufficient by the fence-viewers, they are required to estimate the value of such repairs, and make a certificate thereof, under their hands, with an account of their fees; and the party aggrieved may recover of the party who ought to have made such repairs, double the value of such repairs, together with the fees of the fence-viewers; and on his neglect or refusal to make payment thereof, for thirty days after it shall be demanded, the party aggrieved may sue for and recover the same, by an action on the case (*R. S., ch. 21, § 5*).

The Supreme Court of Errors have decided that an action on the statute concerning fences, to recover double the value of repairs made pursuant to the fifth section of that statute, is "an action on the case," within the meaning of the same statute. And where it was averred, in such action, in one count, that the plaintiff and defendant being adjoining proprietors of certain tracts of land, the defendant neglected and refused to keep in repair the divisional fence between these tracts, without any covenant that it was the duty of the defendant to keep such fence in repair, the court held the count fatally defective. But when it was averred in another count, that the plaintiff and defendant being adjoining proprietors, the defendant neglected and refused to keep in repair that part of the divisional fence which he was bound to maintain and keep in repair, the court held the count sufficient, especially after verdict. The court held that in such an action, it is suffi-

cient for the plaintiff to bring his case within the express provisions of the statute (*Sharp v. Curtiss*, 15 *Conn. R.*, 526).

The Supreme Court of Errors have also held that under the section of the statute last under consideration, it is not necessary that the fence-viewers should give notice to the delinquent party of their meeting to estimate the value of the repairs (*Edgerton v. Moore*, 28 *Conn. R.*, 600). The same court had previously held that fence-viewers are not judicial officers; that their functions are more analogous to those of appraisers and inspectors, and other boards of that character, than of judges or of courts; and that no notice whatever need be given of their first examination of the defective fence until after it has been made. And it was held in the same court that, where fence-viewers find a divisional fence to be insufficient, their notice to the persons bound to repair it need not specify the particulars in which it is defective; and, further, that, where a divisional fence is found by the fence-viewers to be insufficient, and the person bound to repair it neglects to do this for fifteen days after notice in writing from the fence-viewers, the party aggrieved may repair it in any reasonable manner, and the expense may be allowed by the fence-viewers. It appeared in such action that the defendant's part of the fence was, and for more than fifteen years had been, a ditch which he had dug; and that the plaintiff had performed no work upon such ditch, but had erected a fence of posts and boards on or near the edge of the ditch, in the dividing line between the lands of the parties, and the fence-viewers certified that the sum of twenty-three dollars and eighty-seven cents was the value of the repairs made by the plaintiff upon the defendant's fence. The court held that the plaintiff was not required by law to make the necessary repairs of such fence by enlarging the ditch, but might make them in any reasonable manner, and, therefore that he was entitled to recover (*Fox v. Beebee*, 24 *Conn. R.*, 271). And the same court, at a later term, held a notice of the insufficiency of a fence, signed by two out of three fence-viewers, to be sufficient, where all the fence-viewers had been notified to be present and act; and various other points in reference to the notice were settled in the same case. For example, that reasonable certainty is all that is required in the description of the fence in such a notice. A notice given by the fence-viewers was as follows: "Mr. S., you will take notice that the undersigned, fence-viewers of the

town of W., have been called on by G. to view the fence between his land and yours; and on a view we find your portion of the fence insufficient; and if you do not repair the same within fifteen days the said G. will repair the same at your expense." It appeared that there was other land of S. adjoining that of G. within the same town, but that there had been no complaint made by G. to S. of the fence in question, and that S. had some time before commenced repairing it upon a former notice from the fence-viewers; and that, in fact, S. was not in doubt what fence was intended. The court held that, in the circumstances, the notice was not insufficient in not specifying the particular fence intended. It was further held that the notice was not insufficient in not stating the particular part of the fence which belonged to S. And also, that it was not insufficient in not stating when the fifteen days, limited for reparation of the fence by S., began to run. It was declared to have been the intention of the Legislature to allow fifteen days from the time of the service of the notice; and it was held that the notice should be in writing, but that the service of it may be entirely informal; that a duly authenticated notice, left at the dwelling-house of the party is sufficient; and such a notice was held to be sufficient, although the party was absent at the time from the State. And where a notice was received by a party while out of the State, it was held to operate upon him in the same manner as if received within the State (*Gregor v. Stratton*, 29 *Conn. R.*, 421).

The statute provides that whenever there is not, or shall not have been a division fence between any two adjoining proprietors, whose lands are otherwise inclosed in severalty, or where, by distribution, sale or otherwise, a particular inclosure shall be divided between two or more proprietors, and either shall desire to have a division fence erected between him and the adjoining proprietor or proprietors, and the parties cannot agree, any two of the fence-viewers of the town where such land is situated (and if the same is situated in more than one town, then one fence-viewer from each town in which it is situated) may view said dividing line, first giving reasonable notice of the time when they will meet for that purpose to said proprietors; and if said fence-viewers shall deem it reasonable that said fence should be erected at the expense of each of said adjoining proprietors, they shall divide and stake out said line, and assign to each his portion thereof, and limit a

time within which the fence thereon shall be erected; and each proprietor is required to erect a lawful fence on the portion of said line so set to him; and if either of said proprietors shall make his portion of said fence, and the other proprietor or proprietors shall neglect to build his or their portion within the time limited, the fence-viewers may build the same, or may authorize or direct the proprietor who has erected his portion to build the same; and when said fence is so built by said fence-viewers, or by said proprietor, they or he may recover the expense thereof, and the fees of the fence-viewers therefor, in an action of debt on the statute (*R. S., ch. 21, § 7*).

It has been decided by the Supreme Court of Errors that fence-viewers, empowered by this provision of the statute to order a fence made upon the dividing line between adjoining proprietors, and to divide and stake out the line for that purpose, have no power to fix the line where it is disputed or uncertain; but that this duty belongs wholly to the committee of freeholders provided for by another statute; and it was declared and held, where the fence-viewers order a fence made upon a line which is not the true line between the parties, that their action is void (*Talcott v. Stillman*, 28 *Conn. R.*, 193). Where a town has elected but a single selectman, and he, as such, had acted in the division of a fence between adjoining proprietors, under the statute which confers power on the "selectmen" of a town so to act, but had acted at the request of both parties, the court held that, whether or not he had the full power of a board of selectmen in the matter, no objection could be taken to his want of such power (*Kellogg v. Brown*, 32 *Conn. R.*, 108). And it has been more recently held that the fence-viewers, provided by statute mentioned, are *quasi* public officers; and the fact that they have acted officially is presumptive evidence of their appointment and qualifications (*Holister v. Hollister*, 35 *Conn. R.*, 241).

It is also provided by statute that whenever by sale, distribution, partition, or otherwise, a particular inclosure has been or shall be divided between two or more persons, and the parties in interest cannot agree respecting the division of a fence belonging to said inclosure, or whenever adjoining proprietors cannot agree respecting the division of an existing fence, and there is no record of any division of such fence, any of such parties, or any such adjoining proprietors, may call out any two of the fence-viewers in the

town where such fence is situated, and if the same is situated in two towns, one of said fence-viewers shall be from each town; and said fence-viewers are required to view the fence, and make such divisions and apportionments thereof as may be necessary to do justice to all the parties, and award in favor of such parties, and against such parties, as they shall deem just, such sums as in their judgment shall be reasonable, to be recovered in an action of debt; such award must be in writing, signed by such fence-viewers, describing such division and apportionments, and limiting a time for the payment of the sums awarded, and the same must be recorded in the records of the town or towns where such fence is situated; and said apportionments and award will not be invalid in consequence of any inaccuracy, if the location of such division, the respective parties, and the sums awarded, can be understood (*R. S., ch. 21, § 8*).

Where the plaintiff, in an action founded on this section of the statute concerning fences, to recover the sum awarded to him by the fence-viewers, alleged that he and the defendant were owners of inclosed lands, separated by a stone wall, which was originally built entirely by W., under whom the plaintiff held, and which in consequence of a division of the land in July, 1826, it became the duty of the defendant to unite with the plaintiff in dividing, and to pay the plaintiff such sum as should be awarded by the fence-viewers, the Supreme Court of Errors held: 1st. That these facts did not constitute a prescription binding upon the plaintiff, being at most only evidence of use. 2d. That such usage was not of the nature of a covenant which runs with the land, through all time, but was temporary, governing only the immediate owners and the land as it then was. And the division of inclosed lands, by sale or otherwise, *prima facie* subjects them to a new division of the fence among the new owners (*Wright v. Wright, 21 Conn. R., 329*).

It is made unlawful for any person to throw his inclosure open to the commons, and remove his part of the divisional fence, without the assent of a majority of the fence-viewers of the town or towns where the same is situated, in writing, first obtained, and recorded in said town or towns, nor without giving three months' notice to the adjoining proprietor, which proprietor will have the right to purchase such part of said fence, on paying the value thereof, to

be determined, if the parties cannot agree, by either two of the selectmen of the town (*R. S.*, *ch.* 21, § 9).

It is also provided by statute, that all damage done, either in particular inclosures, or common fields, by cattle, horses, sheep or swine, where the fence is sufficient, shall be paid by the owners of them; but if the fence is defective, then by the owners of the fence; but where the fence is defective, the owners of the cattle shall pay the damage before they are released from the pounds, and shall recover the same of the owner of the defective fence (*R. S.*, *ch.* 21, § 11).

Where it appeared that the injury complained of, in an action of trespass for damage done to the plaintiff's land by the defendant's cattle, resulted from the want of a sufficient fence between the adjoining lands of the plaintiff and defendant, that it was the duty of each of the owners of these lands to make and maintain one-half of the divisional fence, and that the plaintiff had never made his part, or taken any measures toward it, the court held that the plaintiff was not entitled to recover (*Studwell v. Ritch*, 14 *Conn. R.*, 292). And it has been subsequently held, that it is a legal incipient or appurtenance, attached *per se* to all lands inclosed and holden in severalty, running with them perpetually, and unaffected by ulterior divisions and subdivisions, that each of the adjoining proprietors shall make and maintain one-half of the division fence (*Wright v. Wright*, 21 *Conn. R.*, 329).

The statute also provides that no person shall be entitled to a recovery for damages done in his inclosure through the insufficiency of his fence, unless such damages were done by swine or horses, or other creatures that go at large on the commons contrary to law, or by unruly cattle that will not be restrained by ordinary fences; or unless the owner of cattle shall put his cattle into, or voluntarily trespass on his neighbor's inclosure; or unless it shall appear that, though part of the fence is deficient, the cattle broke and entered through a sufficient fence; in which case, the owner of the land may impound such creatures, and recover poundage and damages (*R. S.*, *ch.* 21, § 12).

The Supreme Court of Errors of the State have recently held that the statutes, with regard to fences, have left the common law, in regard to the duty of the owners of cattle to restrain them, still in force as to unruly cattle that will not be restrained by ordinary fences; and that landowners in Connecticut are not

bound to fence against such cattle. The court further held that "ordinary fences," in the statute, which speaks of "unruly cattle that will not be restrained by ordinary fences," does not mean lawful fences, but such fences as are common, and sufficient to restrain orderly cattle. A part of the divisional fence between the plaintiff and defendant, which it was the duty of the plaintiff to maintain, was insufficient. The defendant's horse was found in the plaintiff's inclosure, having jumped in from the defendant's, over some part of the plaintiff's fence. The court held that evidence that he jumped back over a part of the fence that was of lawful height was admissible to show that, at the time he entered, he was unruly, and not to be restrained by an ordinary fence (*Hine v. Wooding*, 37 Conn. R., 123). This doctrine is in accordance with an earlier case before the same court, which was an action for a trespass, committed by the defendant's cattle upon the plaintiff's land; and the defense was that the cattle entered from an adjoining field of the defendant, through the plaintiff's insufficient fence. It was held that the plaintiff might show that such cattle were unruly, which would repel the defense (*Barnum v. Vandusen*, 16 Conn. R., 200).

The proprietors of land in any field, established as a common field in Connecticut, may meet by themselves or by their agents, and adopt regulations with respect to the fencing or occupying such common field; and they may choose a committee to take care of and manage the affairs of the common field, and fence-viewers, who must be sworn to a faithful discharge of their duties. The committee of the field, or a committee appointed for that purpose, are required to set out to each proprietor his proportion of the fence, and the place where it is to be made; and the proprietor is required by law to make and maintain it, and must observe the orders of the proprietors for the occupation of the common field. Where the line of a common field bounds upon a particular inclosure, one-half of the fence must be made by the proprietors of the common field, and the other half by the owner of the particular inclosure. Where a common line fence has been established it cannot be altered, except by a vote of the proprietors. And where any person shall purchase land in a common field, the committee appointed to take care of and manage the field have power to set out to such purchaser his proportion of the fence; and he will be bound to maintain the same. Common fields are

to be fenced in the same manner as is required in case of particular inclosures; and the committee of the common field may agree in writing with the proprietors of any particular inclosure in respect to the line fences. The owners of the fence in the line of common fence are required to set and keep up stakes, with the two first letters of their names on them, to distinguish their part of the common fence, under a penalty for neglect imposed by the statute.

The fence-viewers of any common field are required to inspect the fences of such field, and take care that they are kept in sufficient repair, whether such fences belong to the proprietors of the field or the owners of the particular inclosure; and the method by which this duty is to be discharged is prescribed by the statute (*Gen. Stat., tit. 21, ch. 2, §§ 13-40*).

The statute further provides that every person who shall wilfully and unlawfully throw down or leave open any bars, gates, fence or fences, belonging to any particular inclosure or common field, shall pay to the party injured double damages; and a sum, not exceeding five dollars, according to the nature and aggravation of the trespass, to be recovered in an action of trespass (*Gen. Stat., tit. 1, ch. 15, § 364*). And any person who shall willfully and maliciously cut, injure, deface or throw down any fence on the land of another is made liable to be punished by fine not exceeding one hundred dollars, or imprisonment in a common jail not exceeding twelve months, or by such fine and imprisonment both (*Gen. Stat., tit. 12, ch. 4, § 76*). For similar damage done to any fence in a cemetery or burying-ground, the offender is liable to a fine not exceeding one hundred dollars, or imprisonment in a county jail not exceeding six months, or both such fine and imprisonment (*Gen. Stat., tit. 7, ch. 7, § 370*). In respect to the sufficiency of a statement of the account referred to in the section of the statute which provides for the recovery of double the expense of making a fence for a delinquent proprietor of land adjoining a common field, the court has held that a statement of the appraisal of the fence at a gross sum, was a sufficient "account," within the meaning of a section of the statute fixing the time when double expenses might be recovered at ten days, "after an account shall be presented," if the proprietor neglects to pay or appeal; no objection to such statement having been made by the defendant at the time (*Hollister v. Hollister, 35 Conn. R., 241*).

Owners of land adjoining railroads, who may have received compensation for fencing along the line of their land, are required by law to build and maintain a lawful fence on said line, or as near thereto as they conveniently can, and if they neglect to do so within sixty days after being notified to do so by the railroad company, such railroad company may build the same, and recover the expense thereof in an action of debt against the person so neglecting to build or maintain such fence. And every railroad company is required to erect and maintain good and substantial fences on both sides of its railroad, except at such places as, in the opinion of the railroad commissioners, the erection and maintenance of the same shall be inexpedient or unnecessary under a penalty prescribed by the statute. And every such railroad company is required to construct and maintain good and sufficient fences, on one or both sides of its road, where the same runs within the limits of any public highway or turnpike road, or adjoining thereto; and any railroad company neglecting or refusing to comply with the orders of the railroad commissioners in respect to said fences, is liable to a penalty of \$100 for each day beyond the time limited by the order of said commissioners in which to build or repair the same (*Gen. Stat., tit. 7, ch. 7, §§ 488-492, 494, as amended by Laws of 1866, ch. 87*).

And by an act approved July 6th, 1870, it is provided that whenever adjoining proprietors of land cannot agree upon the kind of fence to be erected and maintained between them, and the land of one of the proprietors is a homestead lot, or a lot upon which is a dwelling-house within 100 rods of the division line, the fence-viewers of the town shall meet and consider any proposition which may be made in respect to such division fence, or any portion of the same, and the proprietor of the home lot may, upon the terms and conditions named by the fence-viewers, erect a better fence than the law requires in respect to the division of field lands, and the adjoining proprietor must bear such portion of the expense as he would bear for the erection of a common post and rail fence or its legal equivalent, provided that if the existing fence shall be of any present value, it must be set out by the fence-viewers, according to their appraisal and decision, to the party having just claim to the same. The method of proceeding is prescribed by the statute (*Laws of 1870, ch. 61*).

In some respects the laws of Connecticut respecting fences, are

peculiar to that State. For example, in one case before the Supreme Court of Errors, involving the question, it appeared that the plaintiff's grantor built the entire fence originally, and the plaintiff and defendant had enjoyed it for more than fifteen years. The court held that this did not show that the plaintiff was bound, by prescription, to maintain the entire fence in its present condition, for there was nothing of an adverse character in the user, neither party having done any more than he was obliged to do, in order to the full and secure enjoyment of his property. And it was further held that, if such user could be considered as evidence of an agreement of the parties to that effect, during its continuance, the evidence might be resisted, by showing why and how the user took place. And it was observed by the court, that the law of Connecticut is different from that of Massachusetts and of England in this respect; that in Connecticut, the owner or occupier of the land is obliged to fence it against cattle, at his own risk, and if his land is not fenced, he can neither recover damages, nor impound for a trespass by cattle; whereas in Massachusetts and in England, the owner of the cattle must restrain them at his own risk, or he will be liable, if they trespass upon the lands of others (*Wright v. Wright*, 21 *Conn. R.*, 329).

In the State of Connecticut, the owner of an inclosure may lawfully impound cattle which have broken into it from an adjoining inclosure through the insufficient fence of the owner of the cattle, although his own part of the divisional fence was also insufficient (*Hine v. Munson*, 32 *Conn. R.*, 219).

CHAPTER XXXVII.

STATUTES OF THE SEVERAL STATES RESPECTING FENCES.—LAWS OF NEW JERSEY—WHAT ARE LAWFUL FENCES IN THE STATE—RULES IN RESPECT TO DIVISION FENCES—ROAD AND STREET FENCES IN THE TOWNSHIP OF LINDEN—POWERS OF THE TOWNSHIP COMMITTEES—LAWS OF PENNSYLVANIA—WHAT INCLOSURES TO BE FENCED IN THE STATE—RULES IN RESPECT TO PARTITION FENCES—PARTY WALLS AND FENCES IN PHILADELPHIA—LAWS OF DELAWARE—RULES IN RESPECT TO PARTITION AND OTHER FENCES IN THE STATE—LAWS OF MARYLAND—NO GENERAL RULES IN RESPECT TO FENCES IN THE STATE—LAWS OF VIRGINIA—WHAT IS A LAWFUL FENCE IN THE STATE—LAWS OF WEST VIRGINIA—WHAT IS A LAWFUL FENCE IN THE STATE, AND RULES RESPECTING DIVISION FENCES THEREIN.

IN the State of New Jersey the statute declares that all fences, consisting of posts and rails, timber, boards, brick or stone walls, shall be esteemed lawful, if four feet and two inches high; and that all other fences shall be lawful, if four feet and six inches high, measuring from the level or surface of the earth, and close, strong and sufficient to prevent horses and neat cattle from going through or under the same; and partition fences, between improved lands, are required to be sufficiently close and strong as to prevent sheep from going through or under the same. Ditches and drains through salt marshes and meadows, five feet wide and three feet deep, and, through other meadows, nine feet wide at the surface of the meadow, four feet and a half wide at the bottom, and three feet deep, and lying on a mud or miry bottom, are also adjudged lawful fences. All brooks, rivers, ponds, creeks and hedges, or other matter or thing equivalent to any such fence, may be adjudged lawful fences, at the discretion of the town committee called to view the same. And the owner of beasts trespassing through or over a lawful fence, is liable for the damages. Owners of adjoining lands are required to maintain an equal proportion of the division fences, except such as choose to let their lands lie open or vacant. And where any person, bound to maintain a fence, refuses or neglects to build or repair his or her part of such fence, after due notice to do so, the other party may build or repair the whole fence, and recover half of the expense of the negligent party, to be appraised and certified by the town com-

mittee, with costs. In case parties cannot agree in respect to the division of the partition fence, the town committee must settle it; after due notice to the parties, and after the division, the share set to each will be his, thereafter to keep in repair and maintain. When the line between the parties is a creek, brook and the like, and the parties cannot agree as to where the division line shall be built, the same must in like manner be fixed by the town committee.

After a line fence shall have been built, and either party decides to let his adjoining land lie open and common, he may take up his part of the line fence, upon giving the person in possession of the adjoining land twelve months' notice; but not otherwise. Parties may in all cases agree in writing in respect to their division fences. No person can recover damage for trespasses through a defective line fence which he is bound to maintain; but he is made liable for damage done by his own beasts to the adjoining owner by reason of his own defective fence.

Provision is made for impounding cattle trespassing on the lands of one whose proportion of the division fence is in order.

The provision in respect to a fence being sufficiently close to prevent sheep from going through does not apply to lands of adjoining owners, lying upon streams or rivers, subject to overflow, commonly known as low-meadow land; and such lands need not be fenced against sheep except by mutual agreement. Swinging gates may be erected by owners of adjoining lands, and the same will be considered a lawful fence, provided the same be four feet six inches high, and so close as to prevent horses, cattle and sheep from going through. The provisions of the statute in respect to division fences where the boundary is a creek, brook, and the like, are made applicable to private roads (*Nixon's Digest*, 4th ed., 331-336).

By a special act of the Legislature, owners of land within the township of Linden, in the county of Union, are required to maintain a legal fence along the line of any street or road adjoining their lands, although such owners of land are not to be bound to keep closed the gates leading from such street or road to their dwelling-houses (*Laws of 1870*, ch. 398).

The Supreme Court of the State has decided that, where two persons own adjoining closes of improved land, between whom the partition fence has never been divided, or the portion to be

kept up by each in anywise ascertained, neither can impose on the other the liability, or claim for himself the protection contemplated by the statute regulating fences; and if the cattle of one enter upon the close of the other an action of trespass will lie against the owner of the cattle. And it was further held, in the same case, that a party may waive the action given by the statute, and resort to his common-law remedy for his damages (*Coxe v. Robbins*, 4 *Halst. R.*, 384).

It seems that the township committee have no authority to alter or change a partition fence; they have power to fix the place only in a case where none has previously existed (*Miller v. Barnet*, 3 *N. J. R.*, 547). And, again, it appears the order of the committee, fixing the place of a partition fence, is designed only as a temporary regulation until the place shall be legally settled, and to enable the party making the fence to recover from the other his proportion of the expense (*Corlis v. Little*, 13 *N. J. R.*, 229). It may be added that in the State of New Jersey, as a rule, the owner of land adjoining a highway is not bound to erect a fence along such highway. The statute applies only to owners of adjoining closes (*Chambers v. Matthews*, 3 *Harrison's R.*, 368).

In an action under the New Jersey statute regulating fences, in order to give the appraisement in evidence, the Supreme Court of the State has held that the state of demand must show that the plaintiff's fence was lawful; that the horses or other beasts broke through, etc., and did damage; and that the appraisers were chosen as the law directs (*Brittin v. Van Camp*, 2 *Pennington's R.*, 662).

In the State of Pennsylvania, all cornfields and grounds kept for inclosures, are required by statute to be well fenced, with fence at least five feet high, of sufficient rails or logs, and close at the bottom. And whosoever, not having his ground so inclosed, shall hurt, kill or do damage to any horse, kine, sheep, hogs or goats of any other person, by hurting or driving them out of or from said grounds, is made liable to make good the damage. Any person who shall maliciously break or thrown down any fence erected for the inclosure of land, or shall carry away any of the material of such fence, is liable to be punished for a misdemeanor.

Where any two persons shall improve lands adjacent to each other, or where any person shall inclose any land adjoining to another's land already fenced in, so that any part of the first per

son's fence becomes the partition fence between them, in both cases, the charge of such division, so far as is inclosed on both sides, must be equally borne and maintained by both parties. In cases of dispute in respect to partition fences, the fence-viewers or auditors of the town, are to settle the same in the manner pointed out by the statute, except that in the city of Philadelphia, the surveyors and regulators of the city, are to discharge this duty. And all partition fences dividing inclosed lands within the rural districts of the city of Philadelphia, are required to be substantially made, at least four feet and a half high, and of sufficient rails or logs, the bottom rail or log to be not more than eight inches above the ground; and in the built-up portions of said city, a light board or palisade fence, substantially built, at least six feet high, is required, and in either case, the fence-viewers and board of managers and regulators may designate the kind of fence to be built; provided that the cost of the fence in the rural districts shall not exceed twelve cents per lineal foot, and in the built-up portions of the city, not exceeding twenty-five cents per lineal foot. In cases where a building shall be a part of such party fence, the owner of the ground on which the building is erected, will be allowed for so much of said building as forms part of the partition, as part of his share of the whole fence, in proportion to the cost of the whole. Parties may agree to divide any partition fence between them, but the agreement must be filed in the office of the board of surveyors and regulators, to be there kept as a public record. If a party shall be delinquent in making or repairing any fence, the statute prescribes a remedy to the party aggrieved, by permitting him to proceed and do the work himself, and recover the expense thereof of the delinquent (*Brightley's Purdon's Digest*, 693-695). Incorporated boroughs in the commonwealth of Pennsylvania, have power, among other things, to make all needful regulations respecting the foundations and party walls of buildings, and partition fences (*Brightley's Purd. Dig.*, 168).

It has been held by the Supreme Court of the State that, where there is only a line between lands of different parties, each party has a right to insist on a common partition fence. Where one party erected his half, it was held, that the other who refused to finish it, had no ground of action for damage done by the former's cattle, which by the completion of the fence might have been pre-

vented (*Rangler v. McCreight*, 27 Penn. R., 95). But where an owner of unimproved land, adjoining unimproved land of another person, builds a fence on the line, he cannot call on the other for contribution. It was held in the same case, that, if a man's land is inclosed by an insufficient fence, and another's cattle enter upon it, he may drive them out, but must answer for any injury done to them in driving them out; but if he drives them into the highway, and they afterward suffer injury without his fault, the court held he would not be responsible (*Palmer v. Silverthorn*, 32 Penn. R., 65).

Either owner of adjoining premises may erect a partition fence at his pleasure, and his occupation of such land of his neighbor as is requisite for such purpose, is not adverse, but by permission. And where one owner clears and incloses to a fence already erected on the boundary line, he may insert the rails of his new fence into the partition fence, and if they project a short distance, the court holds that it falls within the maxim *de minimis, etc* (*Dysart v. Leeds*, 2 Barr's R., 488). And where a partition fence has been destroyed by a flood, either party may recede from the former line, and erect the fence on his own land, leaving the intervening space open to the public; in which case, he is not bound to maintain the former fence. It seems, however, that he is only entitled to do so in the event of a destruction of the former fence by an accident (*Painter v. Reece*, 2 Barr's R., 126).

If there is in fact a partition fence, by the laws of Pennsylvania, the duty of contribution to maintain it exists, although the line may be in dispute. The jurisdiction of a justice of the peace, under the fence law, to enforce contributions, is not ousted by raising a question of title to land (*Stephens v. Shriver*, 25 Penn. R., 78). By law, the expense of a partition fence between adjoining improved lands must be borne equally by the owners. A lane existed between the lands of A. and B.; but A. claiming the land in the lane, B. removed his fence, leaving a space on his own land for a lane. It was left open at both ends, and was used by all who chose to do so. B. removed his fence to where A.'s fence formerly stood, including the old lane. The Superior Court of the State held that the new lane was not improved land, and A. was not bound to bear the expense of half the fence built by B. (*Rohrer v. Rohrer*, 18 Penn. R., 367).

Under the act of Pennsylvania relative to partition fences a

landowner is not entitled to five day's notice before the meeting of the fence-viewers; he is entitled, however, to a notice of the view; but if he attends the view without it, and does not object to the want of notice, he cannot afterward raise the objection. It is also held that the certificate of fence-viewers should not be disregarded as not sustaining itself, if the facts in the case sustain it. Any material omission in the certificate may be supplied by oral testimony. But if the certificate be void for uncertainty, the remedy of the complaining party is not gone, as he can still recover for his work and labor on proving otherwise its necessity and value. And it is not essential to the right of action that the auditors should have taken an official oath as fence-viewers. Nor is such oath, it seems, essential to the validity of the certificate (*Shriver v. Stephens*, 20 *Penn. R.*, 138).

It has been held by the courts of Pennsylvania that, where the owner of land erects a party wall, half on one lot and half on the other, the purchaser of one of the lots at a sheriff's sale cannot recover of the purchaser of the other lot, who afterward uses the wall as a party wall, for such use, neither under the Pennsylvania act of February 21, 1724, nor by common law (*Oat v. Middleton*, 2 *Miles' R.*, 247).

And in a much later case the Supreme Court of the State held that the decisions of the surveyor of the city of Philadelphia directing the removal of a party wall is conclusive, no appeal therefrom lying to the Common Pleas; and under the act of April 5th, 1849, the Common Pleas may cause the wall to be forthwith removed. In the course of his opinion, Lowrie, J., examined the law in respect to party walls in the city of Philadelphia, and concluded that there could be no available objection to it, or the principle on which it is based, and said that the law as to partition fences involved the same principle (*Evans v. Jayne*, 23 *Penn. R.*, 34).

Under the laws of Pennsylvania one of the owners of adjacent lands cannot call upon the other to contribute to the change of a division fence. It was held that the act of 11th March, 1842, has no application to such a case, and the act of 1700 does not require the owner of land, inclosed by an insufficient fence, to permit trespassing cattle to remain in his fields; it only gives damages to the owner of the cattle for any injury done to them in driving them out of the other party's grounds (*Palmer v. Silverhorn*, 32 *Penn*

R., 65). And the Supreme Court has recently held that the common law required the owner to keep his cattle within his close, and their intrusion on another's possession was a trespass; and it was declared that this would be the rule in Pennsylvania, except for the acts of assembly imposing duties upon landowners, other than those of the English common law. Under the Pennsylvania law the owner of improved lands must fence them, both to restrain his cattle and to shut out the roving cattle of his neighbors. Unless improved lands are inclosed by a fence the owner is in default, and cannot maintain trespass for damages by roving cattle. The law requires improved lands to be fenced; and where it is the duty of the landowner to fence his land, he cannot recover for damages by stray cattle while he neglects his duty (*Gregg v. Gregg*, 55 Penn. R., 227; *vide Adams v. McKinney*, *Addison's R.*, 258.) In a very late case before the Superior Court it appeared that adjoining landowners had agreed not to make any common division fence, and it was held that each was liable to the other for trespass from his cattle. And it was declared that keeping up the partition fence being a common duty, the parties might waive it. The case of *Gregg v. Gregg* (*supra*), was declared not to be a case between the owners of adjoining improved land, and was, therefore, no authority for the case at bar (*Milligan v. Wekinger*, 68 Penn. R., 235).

There is a statute of Pennsylvania authorizing the impounding of cattle trespassing upon inclosures by a substantial fence; and it has been decided that a party impounding cattle must proceed according to the statute or he will be deemed a trespasser *ab initio*, and responsible in damages to the owner of the cattle (*Fitzwater v. Stout*, 16 Penn. R., 22).

In the little State of Delaware, the statute provides that a good fence of wood, stone, or well-set thorn, four and a half feet high, or four feet high, and having a ditch within two feet of it, shall be deemed a lawful fence in New Castle and Kent counties; and in Sussex county four feet is made the height of lawful fences. And if any horse, cattle, goat, sheep or hog shall trespass on grounds inclosed with lawful fences, the owner of such trespassing animal is required to pay the damages awarded by the fence-viewers. If such animals are unruly, and break through lawful fences to commit such trespass, the owner is made liable to pay double

damages for any such trespass committed by said animals after notice that they are so unruly.

The respective occupants of lands inclosed by fences are required to maintain partition fences between them in equal shares, so long as both parties continue to improve the same. And when any person shall inclose land adjoining another's inclosed land, so that any part of the fence, or fence and ditch, or hedge and ditch, or wall, already made, becomes a partition fence, the fence-viewers must determine what sum shall be paid by the one to the other; and the fence must then be maintained by the parties equally. The adjoining owners or occupants of embanked marshes or meadows are obliged to join in cutting division ditches, at least eight feet wide and two and a half feet deep, and in making fences at least two feet high, within one foot of the edge of said ditches, at their common cost, and such ditches are required to be well cleaned once in each year, and the fences kept in good repair, and then they are deemed lawful fences. Any person refusing or neglecting to join in making such ditch and fence, or in keeping the same in good order and repair, is made liable to the adjoining owner who does the work for his proportion of the cost thereof, to be determined by the fence-viewers. The fence-viewers are also made sole judges of the sufficiency of fences, and of the charges of making and repairing the same (*Revised Code, ch. 57*).

In the State of Maryland they have no general laws on the subject of fences. The matter is regulated by local laws for the several counties. For example, by the statute now in force relating to the county of Baltimore, when the lands of any two persons adjoin, each of them must make and maintain one-half of the whole length of the line of fence between them, and if either party shall fail to do so, after the expiration of sixty days' notice or request in writing for that purpose, the other party may make or repair the same, as the case may be, and recover the expense thereof from the party in default. The statute prescribes the course of procedure in cases where a party neglects to build or repair his portion of a line fence. Fences are to be at least four feet high, and sufficiently close to prevent hogs from passing through the same, provided such fence be not within five miles of the city of Baltimore (*Laws of 1870, ch. 437*).

In the county of Allegany, lands must be inclosed by a good and substantial fence, at least four and a half feet high, and it is

made unlawful to impound any horned or black-cattle, horses, mules, sheep or hogs, unless they are found trespassing within an inclosure inclosed by such fence (*Laws of 1870, ch. 137*). And in Carroll county, all post and rail or plank fences are required to be at least four feet and a half high, stone fences four feet high, and all worm or other fences must be at least five feet high, and the distance in any case is to be computed from the ground, or base of any embankment on which the same may be placed (*Laws of 1870, ch. 432*).

The foregoing may be regarded as fair specimens of the local laws upon the subject of fences, and it can hardly be worth the space required to refer to all the local regulations for the twenty-one counties of the State. It has been held by the courts that in a county where there is no act of the legislature regulating partition fences, the principles of the common law will prevail; that the tenant of a close is not bound or obliged to fence against an adjoining close, unless by force of prescription, but that he is bound at his peril to keep his cattle on his own close (*Richardson v. Milburn, 11 Md. R., 340*).

By the statutes of Virginia, every fence five feet high which, if the fence be on a mound, shall include the mound to the bottom of the ditch, is deemed a lawful fence as to horses, cattle, hogs, sheep and goats, which cannot creep through the same (*Code of 1860, ch. 99, § 1, as amended by Laws of 1872, ch. 239*). Special provisions are made respecting the maintaining of fences upon the low grounds on either side of the James river in certain specified counties, which it would take too much space to enumerate here (*Code, ch. 99, §§ 3-5*). And certain rivers and streams are deemed lawful fences, between certain specified points, which may be seen by reference to the second section of the chapter referred to.

A case relating to the law respecting fences came before the courts of Virginia several years ago, wherein it appeared that a party in actual and peaceable possession of land which he claimed as his own, inclosed it with a fence. About four years afterward, another person, who claimed the same land, and had a better title to it, forcibly pulled down and removed the fence. It was held, that this was not a trespass for which a prosecution could be sustained under the Virginia statute of February 14th, 1823 (*Campbell's Case, 2 Robinson's R., 791*). And in a later case before the same courts, wherein it appeared that a person was indicted for

removing a fence under the Supp. Rev. Code of Virginia (chapter 226, section one), and the proof showed that he removed the fence under a claim of right, believing it to be his own, and that he had a *bona fide* right to it. The courts held that he had committed no offense against the statute. And it was held in the same case, that an indictment which charges that the defendant knowingly and willfully removed a fence from the lands of A., and did injure and expose the growing crop of A. then on said land, charges but one offense and is valid (*Ratcliffe v. The Commonwealth*, 5 *Gratton's R.*, 657).

In West Virginia the statute provides that the following fences shall be deemed legal, viz: If built of common rails, and known as the worm fence, four and a half feet high; if built with posts and rails, or posts and plank or pickets, four feet high; if built with stone, two feet wide at the base, three and a half feet high; if a hedge fence, four feet high. And if any such fence be built upon a mound, the same from the bottom of the ditch is to be included in estimating the height of the fence. All streams and rivers in the State which were lawful fences at the time the act in respect to fences became a law, continue to be lawful fences. And the board of supervisors of any county may declare, by ordinance, any river or stream in their county, or which constitutes a boundary line thereof, a lawful fence, and may discontinue any such river or stream, or any part thereof, as a lawful fence, which has already been declared to be such.

Where two or more persons shall have lands adjoining, each of them is required to make and maintain a just proportion of the division fence between them, except one of them shall choose to let his land lie open, and then if he afterward inclose his land, he is required to refund to the owner of the adjoining land a just proportion of the value at that time, of any division fence that shall have been made by him, the value of which, and the proportion to be paid, and all other disputes respecting such fences, are to be settled, in case of disagreement between the parties, by three persons to be agreed upon by them, or in case, they fail to agree on them, to be appointed by the board of supervisors of the county. In case of dispute in which the sufficiency of a fence comes in question, the statute presumes that the same was, at the time the controversy arose, a lawful fence and in good repair, unless the contrary be proven (*Code of 1868, ch. 60*). And it is

provided by the second section of the same chapter that if any horses, mules, cattle, sheep, hogs or goats, shall enter grounds inclosed with a lawful fence, the owner or manager of any such animal shall be liable to the owner of the grounds for any damages he may sustain thereby; and for every succeeding trespass by such animal, the owner thereof is made liable for double damages. And after having given at least five days' notice to the owner or manager of such animal of the fact of two previous trespasses, the owner or occupier of such grounds will be entitled to such animal, if it be found again trespassing on said grounds.

CHAPTER XXXVIII.

STATUTES OF THE SEVERAL STATES RESPECTING FENCES — LAWS OF OHIO — LAWS OF MICHIGAN — LAWS OF INDIANA — LAWS OF ILLINOIS — STATUTES AND DECISIONS OF THE COURTS UPON THE SUBJECT OF FENCES.

By the statutes of Ohio the respective owners or lessees of one or more years of lands, are required to keep up and maintain in good repair all partition fences between their own and the next adjoining inclosures in equal shares, so long as both parties continue to occupy or improve the same. And when one owner incloses his land with a proper fence, and subsequently the adjoining owner incloses his land on the opposite side, provision is made requiring him to contribute to the cost and expense of the line fence already built (1 *R. S.*, *ch.* 45, § 1). And when any controversy shall arise about the rights of the respective owners of partition fences, and their obligation to keep up and maintain the same in good repair, and they cannot agree among themselves, the statute provides for submitting the same to the trustees of the township in which the fence is situate, who may adjust the difficulty, and the parties are bound to comply with their order in the premises. And remedies are provided in case either party fails to comply with the order of the trustees in the matter of the line fence submitted to them (1 *R. S.*, *ch.* 45, § 3, *as amended by Laws of 1873, pages 246, 247*). Provision is also made by the statute for a readjustment of controversies in respect to partition fences,

after the expiration of one year from the date of the first adjustment. Provision is also made for ascertaining and recovering damages sustained by trespassing animals on account of partition fences being out of repair; and penalties are prescribed for allowing breachy animals to run at large. The statute also provides that in all cases where the inclosures of two or more persons shall be divided by a partition fence of any kind, and either of the parties shall think proper to vacate his part of such inclosure, or to make a lane or passage between such adjoining inclosures, such person shall be at liberty to remove his share or part of such partition fence, on giving six months' notice, in writing, of such intention, to the party owning or occupying the adjoining inclosure, or to his agent, if such party is not a resident of the county (1 *R. S.*, *ch.* 45, §§ 4-17). Railroad companies are required to fence their roads with good substantial wooden fences, under certain specified regulations prescribed by the statute (1 *R. S.*, *ch.* 29, §§ 35, 180, 181, 184).

The Supreme Court of the State has held, that, though there is no law in Ohio, requiring any person to fence or inclose his grounds, yet the owner who leaves his lands uninclosed, takes the risk of intrusion upon his grounds, from the animals of other persons, running at large (*Kerwhacker v. The Cleveland, Columbus and Cincinnati Railroad Company*, 3 *Ohio, N. S. R.*, 172). It appears, therefore, that the common law, which requires the owners of cattle and other animals, to keep them upon their own premises, at their peril, is not in force in the State of Ohio, even though they have no statute in the State abrogating the rule. The Supreme Court of the State has expressly held, that the common-law doctrine making the owner of domestic animals a trespasser, if he permits them to stray upon the uninclosed lands of another, is not the law of Ohio (*The Cleveland, Columbus and Cincinnati Railroad Company v. Elliot*, 4 *Ohio, N. S. R.*, 474).

In the State of Michigan, all fences four and a half feet high, and in good repair, consisting of rails, timber, boards or stone walls, or any combination thereof, and all brooks, rivers, ponds, creeks, ditches and hedges, or other things which may be considered equivalent thereto in the judgment of the fence-viewers within whose jurisdiction the same may be, are deemed legal and sufficient fences by statute. And the respective occupants of lands inclosed with fences are required to keep up and maintain

partition fences between their own and the next adjoining inclosures, in equal shares, so long as both parties continue to improve the same. Provision is also made for settling controversies in respect to division fences, and prescribing remedies where parties fail to perform their obligations in respect to the same. All partition fences are required to be kept in good repair throughout the year, unless the occupants on both sides shall otherwise mutually agree. Where lands of different persons, which are required to be fenced, are bounded upon, or divided by any river, brook, pond or creek, which of itself, in the judgment of the fence-viewers is not a sufficient fence, provision is made for adjusting the matter of making a partition fence between the respective parties, and for the enforcement of the order of the fence-viewers in the premises. And where a partition fence running into the water is necessary to be made, the same is required to be done in equal shares unless otherwise agreed by the parties, and in case of delinquency in such case, similar proceedings are to be had as in case of other fences, and with the like effect (1 *Comp. Laws of* 1871, *ch.* 14).

The Supreme Court of the State has recently decided, that the purpose of the act regulating partition fences was, to compel every person to discharge his duty in regard to the same, at the peril of such losses as he might suffer from his neglect, by the beasts of those persons to whom the duty was owing. That this duty was created only for the protection of adjoining proprietors, and that before the duty can become fixed, so as to require him to keep in repair any particular portion of such partition fence, it must appear; first, that the adjoining proprietor improves his land; and second, that either by consent or by the action of the fence-viewers, a portion of the partition fence between them has been assigned to him to keep in repair. And it was declared that adjoining proprietors may dispense, if they see fit, with partition fences altogether, and if such fences are erected, that no particular portion thereof belongs to either party to be kept in repair by him, until in some legal mode the partition is made. Until this is done, it was said that it would be presumed that the parties choose to rely upon their common-law liability for damages by their beasts (*Aylesworth v. Harrington*, 17 *Mich. R.*, 417).

The statutes of Michigan also contain the usual provisions requiring railway companies within the State to erect and main

tain fences on the sides of their respective roads, and prescribing liabilities in case of default (1 *Comp. Laws*, ch. 75, § 43).

It was formerly held, in Michigan, that adjacent landowners in the State were not obliged to maintain a division fence, but that each was responsible for his own cattle, in conformity with the requirements of the common law upon the subject (*Johnson v. Wing*, 3 *Mich. R.*, 163). But the rule has been changed by express provision of statute. In 1847 an act was passed, providing that "no person shall recover for damages done upon lands by beasts, unless in cases where, by the by-laws of the township, such beasts are prohibited from running at large, except when such lands are inclosed by a fence," etc. The court held that this statute did not change the common law, nor require individuals to fence their lands, but only precluded the recovery of damages in case they were not fenced. And it was also held that the statute did not apply to such lands as are not usually fenced, such as railroad tracks, which cannot be entirely fenced (*Williams v. The Michigan Central Railroad Company*, 2 *Mich. R.*, 259). But railway companies are now required by the statute of the State to maintain fences along the sides of their roads. It seems that a person in Michigan is not bound to maintain a partition fence against the cattle of another who is not an adjoining owner or occupant (*Aylesworth v. Herrington*, 17 *Mich. R.*, 417).

In the State of Indiana the statute declares that any structure or hedge, or ditch, in the nature of a fence, used for the purposes of inclosure, which is such as good husbandmen generally keep, and shall on the testimony of skillful men, appear to be sufficient, shall be deemed a lawful fence. And if any domestic animal breaks into an inclosure, the person injured thereby shall recover the amount of damage done, if it shall appear that the fence through which the animal broke was lawful; but otherwise not.

Except where otherwise specially agreed, partition fences, dividing lands occupied on both sides, must be maintained throughout the year, equally by both parties. And if either party fail to do so, the other may give him notice of three days, that he will call upon two disinterested freeholders, at a specified place, on a day fixed, to examine said fence, and if they deem it insufficient to assess the amount required to make it sufficient.

Where any party shall cease to use his lands, or shall lay open his inclosures, he is prohibited from taking away any part of his

fence which forms a partition fence between him and the inclosure of any other person, until he shall have first given six months' notice to such person or persons as may be interested in the removing of said fence, of his intention to remove the same (1 *R. S. of 1862, ch. 62*).

It has been held by the Supreme Court of the State, that both parties to a partition fence in Indiana are equally bound to maintain the same. Either may repair, and enforce contribution from the other, but failure to do so leaves them upon their respective common-law rights and obligations. And it was expressly declared in the case, that the provisions of the statute upon the subject applies solely to outside fences (*Myers v. Dodd, 9 Ind. R., 290*). And in a late case before the same court, it was held that the statute defining a lawful fence, and prohibiting a recovery of damages for cattle breaking into grounds not inclosed by such fence, applies only to outside fences; and that as to inside divisions, parties, in respect to trespassing animals, are left to their common-law rights and liabilities. And it was further held that a person who chooses not to inclose his land, is not responsible for cattle, not under his charge or control, entering his land, and passing from that to adjoining land, whether there be a partition fence or not (*Coot v. Morea, 33 Ind. R., 497*). And in another case before the same court, it was declared that at common law the owner of cattle must fence them in; and that the neighbor was not bound to fence them out. It was further held that the statute of the State only applies to and alters the rule of the common law in this respect as to "outside" fences, and not as to partition fences (*Brady v. Ball, 14 Ind. R., 317*). The owner of domestic cattle is bound, at his peril, to confine them on his own land, and, if they escape and commit a trespass on the land of another, unless through the defect of fences which the latter is bound to repair, the owner will be held a trespasser, though he had in fact no notice of this propensity (*Page v. Hollingsworth, 7 Ind. R., 317*). It seems, that one desiring to remove a partition fence, should, under the Indiana statute, ascertain its value, and how much he may remove, by means similar to those ordained for assessing the expense of erection (*Haines v. Kent, 11 Ind. R., 126*).

Railway corporations in Indiana are required by statute to maintain fences along the sides of their roads with certain exceptions,

and the Supreme Court of the State has held in several cases, that the requiring such companies to fence is a police regulation, making them liable without regard to the negligence of the owner of cattle killed, or his being or not a proprietor of adjoining land (*Indianapolis, etc. Railroad Company v. Townsend*, 10 *Ind. R.*, 38; *The Same v. Meek*, *Ib.*, 502; *Jeffersonville Railroad Company v. Applegate*, *Ib.*, 49; *The Same v. Dougherty*, *Ib.*, 549). But it is held that a railroad company is not liable for cattle killed on the public highway, where sufficient fences and cattle-guards are maintained, without negligence on the part of the company or its agents (*Northern Indiana Railroad Company v. Martin*, 10 *Ind. R.*, 460). And it seems that a railroad company is not bound by the act of March 1st, 1853, to pay for a hog killed on its track at a place where a fence ought not to be erected (*Indianapolis, etc. Railroad Company v. Kinney*, 8 *Ind. R.*, 402). It was held in a later case, that it would seem to be not an unreasonable rule to require owners of land to fence their grounds, as a condition precedent to the right to recover damages for trespasses upon them. And where cattle running at large, stray upon a railroad at a point not fenced, nor required by law to be fenced, and are killed by an engine, the court held that common-law principles must determine the rights and liabilities of the parties (*Indianapolis, etc. Railroad Company v. Caldwell*, 9 *Ind. R.*, 397). It has been recently held by the Supreme Court of the State, that under the present law of Indiana, a railroad company should build a fence between its track and a public highway (*Jeffersonville Railroad Company v. Sweeney*, 32 *Ind. R.*, 430). But it has been held that the statute provisions in Indiana imposing a liability upon railroad companies for injuries to animals through defect of fences, only apply when the casualty occurs at a spot where the company ought by law to maintain a fence. For an animal killed at a spot where the company is not bound to fence, a recovery can be had only upon common-law grounds, that is to say, by proof of negligence or of a willful killing (*Jeffersonville, etc. Railroad Company v. Brevoort*, 30 *Ind. R.*, 324). A portion of a railroad is not excepted from the requirements of the statute as to fences merely because it is within city limits. The exception only extends to places where it is unreasonable or improper that the road should be fenced, whether within or without the limits of

cities or towns (*Indianapolis, etc. Railroad Company v. Parker*, 29 *Ind. R.*, 471; and *vide Same v. Lowe*, *Ib.*, 545).*

The statutes of Illinois provide rules and regulations for proprietors or owners of land used or declared to be "a common field," to take measures in respect to fencing their lands, declaring that they may meet at a given time and place and make rules in respect to the same, appoint the necessary officers and committees, to have the oversight of the business, and the proceedings for locating the fences, building and repairing the same, and the like, are specifically and plainly prescribed (1 *Gross' Stat.*, *ch.* 51, §§ 1-10).

It is also provided by statute that, where two or more persons shall have lands adjoining, each of them shall make and maintain a just proportion of the division fence between them, except the owner or owners of either of the adjoining lands shall choose to let such land lie open. And where any person shall have chosen to let his land lie open, if he shall afterward inclose the same, or if any owner of land adjoining upon the inclosure of another, shall inclose the same upon the inclosure of another, he is required to refund to the owner of the adjoining lands a just proportion of the value at that time of any division fence that shall have been made by such adjoining owner, or he must immediately build his proportion of such division fence. The value of such fence and the proportion thereof to be paid by such person, and the proportion of the division fence to be made and maintained by him, in case of his inclosing his land, must be determined by any two fence-viewers of the town, in counties where township organization shall have been adopted, and in other counties by any two fence-viewers of the county. If disputes arise between the owners of adjoining lands relating to the division fences, the same must be settled by the fence-viewers, and the manner of proceeding is pointed out by the statute.

The statute also provides that, if any person liable to contribute to the erection or reparation of a division fence shall neglect or refuse, for a period of four weeks after notice in writing so to do,

* The legislature of Indiana, by an act passed December 19, 1865, amended the general law of the State in respect to fences, by enacting that a lawful fence shall in all cases be such as to inclose and restrain sheep, unless by mutual consent of the parties interested, they agree to build a fence only to restrain or inclose horses, mules or cattle (*Laws of 1865*, *ch.* 173)

to make and maintain his proportion of such fence, the party injured may make or repair the same at the expense of the party so neglecting or refusing, and the party in default may also be made to pay all damages resulting from his neglect, and the method of proceeding to fix the same is pointed out in the statute.

If any person who shall have made his proportion of a division fence shall be disposed to remove his fence, and suffer his lands to lie open, after having first given the adjoining owner at least sixty days' previous notice, in writing, of his intention so to do, he may, at any time between the first day of December in any year, and the first day of April following, but at no other time, remove the same. And if any such fence shall be removed without such notice, the party removing the same is required to pay to the party injured all such damages as he may thereby sustain, to be recovered with costs of suit.

Whenever a division fence shall be injured or destroyed by fire, floods, or other casualty, the person bound to make and repair such fence, or any part thereof, is bound to make or repair the same, or his just proportion thereof, within ten days after he shall be thereto required by any person interested therein, such requisition to be in writing, and signed by the party making the same. And if such person shall neglect or refuse to make or repair his proportion of such fence, for the period of ten days after such request, the party injured may make or repair the same at the expense of the party so refusing or neglecting, to be recovered with costs of suit. The practice before the fence-viewers is prescribed by the statute, and the manner of recovering damages is also pointed out in the statute (1 *Gross' Stat.*, ch. 51, §§ 20-35).

The statute allows parties to inclose their grounds in any manner they please, with sufficient walls or fences of timber, or by dikes, hedges and ditches, but such walls and fences must be in height at least five feet from the ground, and all dikes must be at least three feet in height from the bottom of the ditch, and planted and set with thorn and other quickset, so that such inclosures shall fully answer and secure the several purposes meant to be answered and secured by law, and such walls or fences of timber, dikes, hedges and ditches, are made subject to the provisions of the statute in respect to fences (1 *Gross' Stat.*, ch. 17, §§ 11-18).

The Supreme Court of Illinois has decided that the common

law requiring the owner of cattle, hogs, etc., to keep them upon his own land, has never been in force in that State, and, accordingly, in order to maintain an action for the trespass of cattle upon one's close there, the owner of the close must have it surrounded by a good and sufficient fence. It was declared that there was no general law in Illinois prohibiting cattle from running at large in the highway (*Seeley v. Peters*, 5 *Gilm. R.*, 130; *Misner v. Light-hall*, 13 *Ill. R.*, 609). The court seems not to have been entirely unanimous in the laying down of this doctrine at first, but the rule is recognized there, nevertheless, and the same doctrine prevails in a few of the other States. The common-law rule, however, requiring the owner of stock to keep it on his own land, has been recognized in the State of Illinois in some cases as governing inside or division fences (*Headam v. Rust*, 39 *Ill. R.*, 186).

It has been held by the Supreme Court of Illinois, that a partition fence, whether existing by agreement, by acquiescence, or under the statute, cannot be removed until the parties interested in its remaining are properly notified of the intended removal (*McCormick v. Tate*, 20 *Ill. R.*, 334; and *vide Gray v. Waterman*, 40 *ib.*, 522). And it has been further held that, if there be an outer and an inner fence to a field, a party not having an exclusive right in the field cannot remove the inner fence, although he is the owner thereof, without subjecting himself to the consequences of exposing the crops to danger. And it was declared to be no defense to an action of trespass, growing out of the removal of the inner fence, to show that the complaining party was bound to keep the outer fence in repair, or that he might have repaired the same at small expense (*Buckmaster v. Cool*, 12 *Ill. R.*, 74; *McCormick v. Tate*, *supra*).

To maintain trespass for damage done by stock, the owner of the close must have it surrounded by a good and sufficient fence, except, that such railroads within the State as are not bound to fence, do not come within the rule (*Headam v. Rust*, *supra*). A good and sufficient fence must be, not merely one which will turn ordinary stock, for a slight barrier might do that, but one that will turn stock even though to some extent unruly (*Chicago & Alton Railroad Company v. Cauffman*, 38 *Ill. R.*, 410). Of course, under the rule which has been adopted, stock is permitted to run at large in the State (*Chicago, Burlington and*

Quincy Railroad Company v. Cauffman, 38 Ill. R., 429; *Illinois Central Railroad Company v. Arnold*, 47 ib., 173).

Where A. and B. join fences, and have no partition fence between the fields, the courts hold that A. cannot recover from C. for injuries occasioned by the stock of C. getting on A.'s field through the defective fence of B. (*Stoner v. Shugart*, 45 Ill. R., 76; and *vide Illinois Central Railroad Company v. Arnold*, 47 ib., 173).

A case came before the Supreme Court of the State a few years ago, in which it appeared that A. having neglected to build his portion of a division fence between his premises and those of B., upon proceedings before two justices under the statute, it was ordered that B. should build A.'s portion, and that A. should pay therefor. The order did not fix the height of the fence. B. built the fence, but not of the height which had been decided upon by the legal voters of the town for all fences. The court held, that if the fence was sufficient to answer the purpose for which it was designed, B. was entitled to recover for building it (*Ketcham v. Stolp*, 15 Ill. R., 341). In an early case, it was held by the same court, that in proceedings under the Illinois "act regulating inclosures," it was necessary that the justice of the peace, before whom proceedings were had, should notify the defendant of the same (*Holliday v. Swailes*, 1 Scam. R., 515).

It has been more recently held by the Supreme Court that, where, in an action of trespass *quare clausum fregit*, the defendant pleaded that the damage done was occasioned by the removal of a partition fence, and that the plaintiff had been notified of this removal, the plea should have shown that notice was given in due time and to a proper person (*McCormick v. Tate*, 20 Ill. R., 334). And in a still more recent case, the same court held that, in order to maintain an action for the trespass of stock upon one's inclosure whereby damage is sustained, the owner of the inclosure must have maintained a good and sufficient fence. And the doctrine was repeated that there was no general law in the State prohibiting cattle from running at large in the highway (*Headam v. Rust*, 39 Ill. R., 186). And in a still later case, the same court has declared, that owners of cattle are permitted to let their cattle run at large, and that an owner of land is required to fence against them, and if they break through a defective outside fence and enter upon the land, the owner cannot confine them until his charges are paid (*Stoner v. Shugart*, 45 Ill. R., 76).

The Supreme Court of the State has recently decided, that, under the Illinois statute requiring the abutting landowner to fence a railroad within six months of its opening, the new owner of an unfenced lot, purchased after the expiration of that term, is not entitled to a period of six months after the change of ownership, within which to comply with the law. And it was declared that such new owner takes possession subject to all consequences of his grantor's non-compliance, so far as liability for injuries to third persons is concerned (*The Toledo, etc. Railroad Company v. Arnold*, 51 Ill. R., 241). The statute of Illinois requires railroad companies to fence their roads against "cattle, horses, sheep and hogs;" and the Supreme Court of the State has declared such statute to be a remedial statute, and that the same must be construed liberally. Applying this rule, it has been held that "cattle" specified in the statute includes "asses" (*Ohio, etc. Railroad Company v. Bunbaker*, 47 Ill. R., 468). And it has also been held that the statute extends to mules (*Toledo, etc. Railroad Company v. Cole*, 50 Ill. R., 184). But the Supreme Court has held that, where a railroad is inclosed by a sufficient fence, and a casual breach occurs therein, without the knowledge or fault of the company, and through such breach, stock get upon the track and are injured, the company will not be liable unless they have had a reasonable time to discover such breach, or have been notified, and failed to repair, before the injury occurred (*Illinois Central Railroad Company v. Swearingen*, 47 Ill. R., 206). But in one case where it appeared that an animal passed on to the railway track through a space made for bars, and was killed, and the bars had been left down for a period of three months, the court held, that the statute required the railroad company to "erect and maintain" a sufficient fence, of which the bars were a part, and that the company, having allowed them to remain down for so long a time, was liable for the loss (*Illinois Central Railroad Company v. Arnold*, 47 Ill. R., 173). The obligation of a railroad company to fence its road at a particular point is a question of law, not of fact for a jury (*Illinois, etc. Railroad Company v. Whalen*, 42 Ill. R., 396). Under the Illinois statute, a railroad company is liable for all damages resulting from its neglect to fence or maintain a sufficient fence without regard to the question whether it used due care in other respects or not (*The St. Louis etc. Railroad Company v. Linden*, 39 Ill. R., 433).

CHAPTER XXXIX.

STATUTES OF THE SEVERAL STATES RESPECTING FENCES — LAWS OF WISCONSIN — LAWS OF MINNESOTA — LAWS OF IOWA — STATUTES AND DECISIONS OF THE COURTS.

IN the State of Wisconsin, the statute provides that all fences four and a half feet high, and in good repair, consisting of rails, timber, boards or stone walls, or any combination thereof, and all brooks, rivers, ponds, creeks, ditches and hedges, or other things which shall be considered equivalent thereto, in the judgment of the fence-viewers within whose jurisdiction the same may be, shall be deemed legal and sufficient fences.

The statute further provides, that the respective occupants of lands inclosed with fences, shall keep up and maintain partition fences between their own and the next adjoining inclosures, in equal shares, so long as both parties continue to improve the same. And in case any party shall neglect to repair or rebuild any partition fence, which of right he ought to maintain, the aggrieved party may complain to two or more fence-viewers of the town, who, after due notice to each party, must proceed to examine the same, and if they shall determine that the fence is insufficient, they are required to signify the same in writing to the delinquent occupant of the land, and direct him to repair or rebuild the same, within such time as they shall deem reasonable; and if such fence shall not be repaired or rebuilt accordingly, it is made lawful for the complainant to repair or rebuild the same. When any deficient fence, built up or repaired by any complainant, as before provided, shall be adjudged sufficient by two or more fence-viewers, and the value of such repairing or building up, together with their fees, shall be ascertained by a certificate under their hands, the complainant is given the right to demand, either of the occupant or owner of the land where the fence was deficient, double the sum so ascertained; and in case of neglect or refusal to pay the sum so due, for one month after demand thereof made, the plaintiff may recover the same with interest at one *per cent* a month, in an action for money paid, laid out and expended; and all lands so occupied or owned as aforesaid, are made liable to levy and seizure or sale on execution issued out of any judgment

obtained in said action, and neither the said lands nor the personal property of the said defendant shall be exempt from such levy and seizure and sale as aforesaid (1 *Taylor's Stat.*, ch. 17, §§ 1-4).

The Supreme Court of the State has decided, that under the statute, the occupants of lands *not inclosed* with fences, are not bound to maintain partition fences between such land and the next adjoining inclosures, and that the decision of fence-viewers requiring the occupant of uninclosed land to erect, maintain or pay for part of a division fence, is *void*. It was further decided, that where, in an action, under the statute, to recover twice the value of certain fencing erected by the plaintiff on the division line between his land and that of the defendant's, the complaint did not aver, nor the answer deny, that the defendant's land was inclosed, but the answer alleged that the proceedings of the fence-viewers were void, it was error to refuse evidence offered by the defendant to show that the land was uninclosed (*Bechtel v. Neilson*, 19 *Wis. R.*, 49). And the same court held that, where swine depasturing in the highway break into an adjoining close, though the fence be defective, the owner is liable; and further, that the public have the full right of passage along and over the highways, but have not the right of pasturage therein (*Harrison v. Brown*, 5 *Wis. R.*, 27).

The statute further provides that, where any controversy shall arise about the right of the respective occupants in partition fences, or their obligation to maintain the same, either party may apply to two or more fence-viewers of the town where the lands lie, who, after due notice to each party, may in writing assign to each his share thereof, and direct the time within which each party shall erect or repair his share of the fence, in the manner provided; which assignment, being recorded in the town clerk's office, is made binding upon the parties, and upon all succeeding occupants of the lands, and they are obligated thereafter to maintain their respective portions of such fence. And in case any party shall refuse or neglect to erect and maintain the part of the fence assigned to him by the fence-viewers, the same may be erected and maintained by the aggrieved party, in the manner before provided, and pay recovered therefore, to be recovered in like manner.

All divisions of fences made by fence-viewers, according to the provisions of the statute, or which shall be made by owners of

adjoining lands, in writing, witnessed by two witnesses, signed, sealed and acknowledged by the parties making the same, being recorded in the town clerk's office, are made good and valid against the parties thereto, their heirs and assigns. And where in any controversy that may arise between occupants of adjoining lands as to their respective rights in any partition fence, it shall appear to the fence-viewers that either of the occupants had, before any complaint made to them, voluntarily erected the whole fence, or more than his just share of the same, or otherwise became proprietor thereof, the other occupant is required to pay for so much as may be assigned to him to repair or maintain, the value of which shall be ascertained and recovered in the manner provided (1 *Taylor's Stat. ch. 17*, §§ 5-8).

All partition fences are required to be kept in good repair throughout the year, unless the occupants of the lands on both sides shall otherwise mutually agree. And where lands of different persons which are required to be fenced, are bounded upon or divided by any river, brook, pond or creek, which of itself, in the judgment of the fence-viewers, is not a sufficient fence, and it is in their opinion impracticable, without unreasonable expense, for the partition fence to be made in such waters, in the place where the true boundary line is, and the parties do not agree to join in making the partition fence, the fence-viewers are empowered by the statute to view the premises and settle the matter, and if either party neglects or refuses to make or maintain his part of the fence as adjusted by the fence-viewers, the other party may build the whole fence and recover half of the expense thereof of the delinquent party (1 *Taylor's Stat., ch. 11*, §§ 9-11).

Provision is also made in the statute in cases where lands have been occupied in common, without a partition fence between the occupants, and one shall be desirous of occupying his part in severalty, and the other party neglects or refuses to divide with him the line where the fence ought to be built, for the fence-viewers to adjust the same, which is made binding upon the parties, and they will be required to build each his proportion of the line fence and pay his proportion of the expense (1 *Taylor's Stat., ch. 17*, §§ 12, 13).

It is further provided by the Wisconsin statute, that where one party shall cease to improve his land, or shall open his inclosure, he shall not take away any part of the partition fence belonging

to him and adjoining the next inclosure, if the owner or occupant of the next inclosure will, within two months after the same shall be ascertained, pay therefor such sum as two or more fence-viewers shall, in writing under their hands, determine to be the value of such partition fence belonging to such party. And where any uninclosed land shall be afterward inclosed, the owner or occupant thereof is required to pay one-half of each partition fence standing upon the line between his land and the inclosure of any other owner or occupant, and the value thereof must be ascertained by two or more fence-viewers of the town in writing under their hands, in case the parties do not agree; and if such owner or occupant shall neglect or refuse, for sixty days after the value has been so ascertained, and demand made, to pay for one-half of such partition fence, the proprietor of such fence may maintain an action for such value, and the costs of ascertaining the same.

In all cases where the line upon which a partition fence is to be made, or divided, is the boundary line between towns, or partly in one town and partly in another, a fence-viewer must be taken from each town. And where a partition fence running into the water is necessary to be made, the same is required to be done in equal shares, and in case either party shall refuse or neglect to make or maintain the share belonging to him, similar proceedings are to be had as in case of other fences, and with like effect. In all cases where the line upon which a partition fence is to be built between unimproved lands has been divided by the fence-viewers, or by agreement in writing between the owners of such lands, recorded in the office of the clerk of the town, the several owners thereof, and their heirs and assigns are bound forever to erect and support such fences, agreeably to such division (1 *Taylor's Stat.*, ch. 17, §§ 14-18).

By another provision of the statute, if any person shall determine not to improve any part of his land adjoining any partition fence that may have been divided according to the provisions of the statute, and shall give six months's notice of such determination, to all the adjoining occupants of lands, he shall not be required to keep up or support any part of such fence, during the time his lands shall be open and unimproved; and he may thereafter remove his proportion thereof, if the owner or occupant of the adjoining inclosure will not pay therefor, as provided by section fourteen, hereinbefore referred to (1 *Taylor's Stat.*, ch

17, § 19). This provision is similar to the statute of New York upon the same subject, so that the decisions of the courts of the latter State upon the question may be applicable here.

The Wisconsin statute further provides that line fences on marsh or swamp land may be made by digging a ditch on the line, or by banks and ditches combined. Equal amount of material and of space occupied must be taken from, or occupy each side of said fence; provided, said banks and ditches combined shall not exceed twelve feet in width; and provided, further, that in all cases said fences shall be subject to the decision of fence-viewers, pursuant to law. And it should be stated, that the overseers of highways in the several towns in the State are made fence-viewers in their respective towns (1 *Taylor's Stat.*, ch. 17, §§ 21, 22).

The statute requires that upon the opening of any private road, the person or persons, for whose benefit the same was granted, shall immediately make and keep in good repair all fences required by the opening of such road (1 *Taylor's Stat.*, ch. 19, § 85). And upon the opening of public highways, the statute provides for the removal of the fences necessary for the use of the road (1 *Taylor's Stat.*, ch. 19, § 98). Railroad companies are required by statute to fence their roads, and are liable for damages occasioned in consequence of their neglect (1 *Taylor's Stat.*, ch. 76, §§ 37-39). And it may be added that the Supreme Court of the State has held that the statutes in relation to fences and fence-viewers, do not apply to ornamental partition fences, between town, village or city lots; nor do they prohibit parties from contracting for building such fences. The court holds that the fences contemplated by the statutes, are the ordinary fences of the country, built upon or inclosing agricultural lands (*Brooks v. Allen*, 1 *Wis. R.*, 127).

It has been held by the courts, that rails, placed along the boundary line of lands for the purpose of being laid up in a fence, though not actually applied to that use, will pass by a conveyance of the lands, there having been a manifest appropriation of them for the use of the land (*Conklin v. Parsons*, 1 *Chandler's R.*, 240).

The question has been settled by the courts, that fence-viewers are, by the statute, authorized, in case of controversy between the occupants of adjoining inclosed lands in relation to their rights in partition fences, to assign to each of them his share of such fences,

and to direct the time within which they shall erect or repair their respective shares; and their determination or assignment is declared to be conclusive upon the parties and their successors in occupancy as to the points so decided. And further, that the fence-viewers have authority also to ascertain the value of such part of a partition fence as one of the parties may have voluntarily built, beyond his just proportion thereof, and the statute requires the other party to pay the value so ascertained. However, the fence-viewers have no authority to try or determine the question whether such part so built by one party has been paid for by the other; but in a suit to recover the value thereof as fixed by the fence-viewers, the defendant must set up and prove that he paid therefor before any proceedings by the fence-viewers (*Butler v. Barlow*, 2 Wis. R., 10).

The courts hold, that it is only the occupants of lands *inclosed* with fences who are required by the Wisconsin statute to maintain partition fences between their own and the next adjoining inclosures; and if, at the time the fence-viewers act in determining that one of the occupants of the adjoining lands shall erect and maintain or pay for a part of a division fence, the lands of such party are uninclosed, their proceedings are without jurisdiction and void. The occupants of such lands are under no obligation to erect fences (*Betshtel v. Neilson*, 19 Wis. R., 49).

An action of trespass was brought in the Wisconsin courts charging the throwing down of a fence inclosing the plaintiff's land, which was shown, however, to be wholly on land of the defendant, who had duly warned the plaintiff of his intent to remove the same. A verdict was found for the plaintiff with nominal damages. The Supreme Court of the State held that it was error in the court below to refuse a new trial moved for, on the ground that the verdict was unsupported by the evidence (*Whalen v. Blackburn*, 14 Wis. R., 432).

Railroad corporations in Wisconsin are required by statute to erect and maintain fences along the sides of their roads, and for a failure to do so, they are made absolutely liable for all damages occasioned by reason thereof. And in an action against a company in such case, it seems to be no defense to allege that the plaintiff had previously trespassed upon the lands of the company constituting the line of its road, by driving the same cattle upon or across the road (*Sikes v. The Chicago, etc. Railway Company*,

21 *Wis. R.*, 370; *Brown v. The Milwaukee Railroad Company*, *Ib.*, 39). But where a railroad company erects, maintains, and keeps in good condition along its road proper fences and cattle-guards, cattle escaping from inclosures adjoining the road upon the track become trespassers, and the law charges the owner with negligence, though he may not be guilty of actual carelessness in allowing them to escape (*Fisher v. The Farmers' Loan Company*, 21 *Wis. R.*, 73).

In the State of Minnesota, it is provided by the statute, that all fences four and a half feet high and in good repair, consisting of rails, timber, boards or stone walls, or any combination thereof, and all brooks, rivers, ponds, creeks, ditches and hedges, or other things which shall be equivalent thereto, in the judgment of the fence-viewers, within whose jurisdiction the same may be, or any such fences as the parties interested may agree upon, shall be deemed legal and sufficient fences. And the respective occupants of lands, inclosed with fences, are required to keep up and maintain partition fences between their own and the next adjoining inclosures, in equal shares, so long as both parties continue to improve the same. If any party neglects to repair or rebuild any partition fence which he ought of right to maintain, the party aggrieved may complain to the town supervisors or a majority of them, who may determine the matter, and direct the delinquent occupant to build or repair the same within a specified time, upon default of which the other party may repair or rebuild the fence and recover double the value thereof as certified by the supervisors, and all controversies respecting partition fences, may be settled by the supervisors. All divisions of fences made by supervisors or by agreement of the owners, in writing, signed, sealed and acknowledged, being recorded, are made good and valid against the parties, their heirs and assigns. And all partition fences are required to be kept in good repair throughout the year, unless the occupants of the lands on both sides otherwise mutually agree.

When lands of different owners which are required to be fenced, are bounded by any river, brook, pond or creek, which of itself is not a sufficient fence in the judgment of the supervisors of the town, and the parties interested disagree respecting the location of the line fence, the same may be settled by the supervisors. All of these provisions of the Minnesota statute are quite similar to the Wisconsin statutes upon the same subject, and the remaining

provisions of the statutes are almost precisely similar to the Wisconsin statutes; so that all that is necessary is to refer to the Wisconsin statutes for the law of Minnesota (*Revised Stat. of 1866, ch. 18*).

But there is an additional provision of the Minnesota statute, giving the electors of each town at their annual town meeting, the right to determine the time and manner in which cattle, horses, mules, asses and sheep are permitted to go at large; provided, that no cattle, horses, mules nor asses be allowed to go at large between the fifteenth of October and the first of April (*R. S., ch. 10, § 15, sub. 6*). And it is further provided, that no damage shall be recovered by the owner of any lands for damage committed thereon by any beasts during the daytime, until it shall first be proved that said lands were inclosed by a lawful fence; and every three rail fence, four and a half feet high, constructed of such materials and in such a manner as to constitute a good and substantial fence as against cattle, horses, asses and mules two or more years old that are not breachy, or any fence equal thereto in efficiency, are to be deemed a lawful fence; but the statute is not to be construed so as to include either sheep or swine or any other domestic animals not exceeding them in size (*R. S., ch. 19, § 29*). It appears that all laws in the State allowing cattle to run at large, have been expressly repealed (*R. S., ch. 122*).

The Supreme Court of the State has recently decided that the common law, in the absence of action by the town, is in force from April to October fifteenth, and that the statute prohibiting the allowing them to go at large from October to April, is but in affirmance of the common law. And it was accordingly decided, that if the town does not otherwise order, it is as unlawful for cattle to run at large in summer, as it is in winter, although the owner of land not legally fenced, can recover nothing for damages done in the daytime by cattle over two years old and not breachy, and this though it be in winter, when all running at large is expressly prohibited by statute (*Lock v. First Division of the St. Paul and Pacific Railroad Company, 15 Min. R., 350*).

In the State of Iowa, the statute provides that the respective owners of lands inclosed with fences, shall keep up and maintain partition fences, between their own and the next adjoining inclosure, so long as they improve them, in equal shares, unless otherwise agreed between them. And if any party neglect to

repair or rebuild a partition fence, or a portion thereof, which he ought to maintain, the aggrieved party may complain to the fence-viewers, who, after due notice to each party, must examine the same, and if they determine that the fence is insufficient, must signify it in writing to the delinquent occupant of the land, and direct him to repair or rebuild the same within such time as they judge reasonable. If the order of the fence-viewers is not complied with, the complainant may repair or rebuild the fence, and the value thereof, being ascertained by the fence-viewers, may be demanded of the delinquent, and if he neglects to pay it for one month after such demand, the same may be recovered with one per cent a month interest, by action.

The statute also contains the usual provision that controversies arising in respect to the erection or maintaining partition fences, shall be determined by the fence viewers, and if either party neglects to erect or maintain the part of the fence assigned him by the fence-viewers, the aggrieved party may do the work himself, and demand and recover double the value thereof, in the manner provided in the other case. And all partition fences are required to be kept in good repair throughout the year, unless the owners on both sides otherwise agree.

No person not wishing his land inclosed and not occupying nor using it otherwise than in common, can be compelled to erect or maintain any fence between him and an adjacent owner; but where he incloses or uses his land otherwise than in common, he is required to contribute to the partition fences as in the statute provided. Provision is also made where lands owned in severalty have been inclosed in common, are desired to be divided, and the parties do not agree as to the fences, for the fence-viewers to adjust the same. And if in such case, where one of the owners desires to throw open any portion of his field not less than twenty feet in width, and leave it uninclosed to be used in common by the public, he may do so on giving the other party six months notice thereof.

And the statute contains, also, the usual provision requiring the party, who shall inclose his land which has before been uninclosed, to pay one-half of the partition fence then standing, to be adjusted by the fence-viewers.

Where a division of fence between owners of improved lands has once made by agreement of the parties, or by the fence

viewers, and recorded in the town clerk's office, the same is made binding; but if either party desires to lay his lands in common, he may do so in the manner before provided. And where a division fence has been located off the line by mistake, the same may be removed on to the line at any time within six months after the line has been run, upon first paying or offering to pay the adverse party the damages occasioned thereby. A person building a division fence, may lay the same upon the line, so that the fence shall be partly on one side and partly on the other, and the owner is given the same right to remove it as if it were wholly on his own land.

A fence made of three rails of good, substantial material, or three boards not less than six inches wide, and three-quarters of an inch thick, such rails or boards to be fastened in or to good substantial posts, not more than ten feet apart, where rails are used, and not more than eight feet apart, where boards are used, or in either wholly or in part, substantially built and kept in good repair, or any other kind of fence, which in the opinion of the fence-viewers shall be equivalent thereto, is declared to be a lawful fence: provided that the lowest or bottom rail or board shall not be more than twenty nor less than sixteen inches from the ground; and that such fence shall be fifty-four inches in height; and provided further, that all partition fences may be made tight at the expense of the party desiring it, and if either party shall use his land for the purpose of pasturing swine or sheep, he is required to keep his share of the partition fence sufficiently tight to restrain such sheep or swine (*Code of 1873, tit. 11, ch. 4*).

The courts of Iowa have held, in terms, that the common-law rule, that the owner of cattle is required to keep them in his own close, or respond in damages for all injuries arising from their running at large, is not in force in the State of Iowa. Said, Wright, C. J., in giving the opinion of the court: "Unlike many of the States, we have no statute declaring in express terms, the common law to be in force in this State. That it is, however, has been frequently decided by this court, and does not, perhaps, admit of controversy. But while this is true, it must be understood that it is adopted only so far as it is *applicable* to us as a people, and may be of a general nature." The learned Chief Justice goes on then to argue that, in the State of Iowa, from the scarcity of timber, it must be many years before their extensive

prairies can be fenced; and their luxuriant growth, sufficient for thousands of cattle, must be suffered to rot and decay where it grows, unless settlers upon their borders are permitted to turn their cattle upon them. He therefore concludes that the principle of the common law requiring every man to keep his cattle within his own close, is inapplicable to the condition of the country and people of Iowa, and consequently was not in force in the State (*Wagner v. Bissell*, 3 *Iowa R.*, 396, 402, 405). And in a later case, the same court held, that in trespass for an injury done by cattle or stock, the plaintiff, in order to recover damages, must show that his fence was sufficient to turn ordinary stock, and the doctrine of the case of *Wagner v. Bissell*, was cited and followed (*Heath v. Coltenback*, 5 *Iowa R.*, 490; but *vide O'Farrall v. Simplot*, 4 *ib.*, 381).

It has been held by the Supreme Court of the State, that the provisions of the Code, regulating partition fences, is not applicable as between the owner in fee of land and a company having a right of way for a railroad over such land (*Henry v. The Dubuque etc. Railroad Company*, 2 *Iowa R.*, 521). But it has been recently held by the same court that, as to third persons, it is the duty of railroad companies to fence their roads, and to keep the gates at private crossings closed and in repair; but where the company is not in fault, and the fence is thrown open by a third person, such third person is liable for a resulting injury instead of the railroad company (*Russell v. Hanley*, 20 *Iowa R.*, 219).

The courts hold that the proceedings of fence-viewers under the statute should receive indulgent consideration, and it was further held that the statute does not in terms require a written notice, though such notice should properly be in writing and proceed from the fence-viewers; but where the party appears upon notice verbally given by the other party, and without objection, it is a sufficient compliance with the statute (*Talbot v. Blacklege*, 22 *Iowa R.*, 572).

It has been declared by the Supreme Court of the State that, where two persons have fields fenced in common, and one of them willfully turns stock into such inclosure, he is liable for the damage done by such stock to the crops of the other, and it is no defense that the inclosure was not surrounded by a lawful fence (*Broadwell v. Wilcox*, 22 *Iowa R.*, 568). The court, in an action of trespass, after defining a lawful fence, instructed the jury, that

whether the fence was a lawful fence, and a good one, was in the *discretion* of the jury; and it was held, that the word *discretion*, in its proper sense, implies judgment, and that used in this sense, the instruction was correct (*McManus v. Finan*, 4 *Iowa R.*, 283). And the same court, in a later case held, in respect to the requisites of a lawful fence, that a fence of a less height than four feet and six inches may, under the provisions of the statute, be a lawful fence if it affords equal strength and security to the inclosure. And further, that in a contest respecting the lawful character of such a fence, the opinion of the fence-viewers as to its sufficiency is admissible in evidence (*Phillips v. Oyster*, 32 *Iowa R.*, 257).

A case came before the Supreme Court of the State several years ago, in which it appeared that A., having built a portion of a partition fence, served notice upon B., owner of adjacent land, requiring him to build half the division fence, B. complied, and by subsequent removals of portions of this fence, A. left B.'s land open to the intrusion of cattle, and B. was obliged to keep building new pieces till he had built the whole length of the line. He then sued A. for the value of one-half of the fence. The court held, that B. might infer that if he built one-half the fence, A. would build the other half, or allow so much of the old fence to remain as was necessary as a division fence. And, therefore, it was further held, that it was properly left to the jury to determine whether A. received a common benefit from B.'s fence; whether he had joined his own fence thereto, and whether it protected his land as it did B.'s; with directions, if they found these facts existed, to return a verdict for the plaintiff (*Schnare v. Gehman*, 9 *Iowa R.*, 283). But in a late case before the same court, it appeared that there was an agreement between adjoining owners to inclose their lands in common. The court held that the effect of the agreement was, for the time being, to release each party from the obligation to build a partition fence, and that cattle of one, when found damage-feasant upon the land of the other, were liable to be distrained, regardless of their owner's intention in turning them in upon his own land (*Winters v. Jacobs*, 29 *Iowa R.*, 115). And in another case before the same court, it appeared that an ox which was allowed by the owner to graze on a common entered a field which was not inclosed by a lawful fence, and died in consequence of eating corn therein. The court held, that the owner of the ox could not recover the value of the animal of

the owner of the corn, because the latter was under no obligation to fence his field as against the public, the right to pasture cattle upon commons in the State of Iowa being permissive merely (*Herold v. Meyers*, 20 *Iowa R.*, 378).

The statute of Iowa makes railway corporations liable for stock killed on the track of their roads at all points where they have a right to fence along the sides of the road (*Laws of 1862, ch. 169*). The Supreme Court of the State has held that this provision of the statute does not include a highway crossing (*Seward v. The Chicago, etc. Railroad Company*, 30 *Iowa R.*, 551). But the same court has held, that, where a railroad and highway run parallel and intersect for some distance before crossing, the railroad company, in order to protect itself from liability, under the law, should build its fences to and erect its cattle-guards at the crossing (*Andre v. The North-western Railroad Company*, 30 *Iowa R.*, 107). It is held, however, that a railroad company is not liable for stock killed on its track unless it has actual or implied notice that the fence was down or gate open, and a reasonable time thereafter to put the same in repair or proper condition (*Aylesworth v. The Chicago, etc. Railroad Company*, 30 *Iowa R.*, 459; *Dewey v. The Same*, 31 *ib.*, 373). A railroad company is liable, under the statute, for damages caused by the killing of sheep which have strayed on the track through a defective fence erected by the company (*Hinman v. The Chicago, etc. Railroad Company*, 28 *Iowa R.*, 491). It seems that the statute does not apply in all cases where there is a strict or abstract right to fence the road of a railway company, if the injury occurs where to build a fence is improper (*Davis v. Burlington, etc. Railroad Company*, 26 *Iowa R.*, 549). And in all these cases against railroad companies for injuries to cattle, etc., the burden of proof is on the plaintiff to show the liability of the company (*Comstock v. Des Moines, etc. Railroad Company*, 32 *Iowa R.*, 376).

It may be of interest to some to state, that the Supreme Court has held that a fence built upon public land, even by mistake, passes with the freehold to the purchaser from the government; and if such fence is detached from the realty by a wrong-doer, the purchaser's right to it is not divested. And in such a case, a removal of the fence by the party who made it, was held to constitute him a wrong-doer (*Burleson v. Teeple*, 2 *Greene's R.*, 542). And the same court has held that rails, laid up in a fence inclos-

ing a field, or a portion of a field, are a part of the freehold, although the fence is not staked with stakes sunk into the ground (*Smith v. Carroll*, 4 *Greene's R.*, 146). This doctrine is not peculiar to the State of Iowa, but may be applied in any of the States where it is not changed by legislative enactment.

CHAPTER XL.

STATUTES OF THE SEVERAL STATES RESPECTING FENCES — LAWS OF MISSOURI — LAWS OF KANSAS — LAWS OF NEBRASKA, NEVADA, OREGON AND CALIFORNIA — STATUTES AND DECISIONS OF THE COURTS UPON THE SUBJECT OF FENCES IN THOSE STATES.

In the State of Missouri, the statute provides that all fields and inclosures shall be inclosed by hedge or with a fence sufficiently close, composed of posts and rails, posts and palings, posts and planks, palisades or rails alone, laid up in the manner commonly called a worm fence, or of turf with ditches on each side. Hedges are required to be at least five feet high, posts and plank, or palisades at least four and a half feet high; those composed of turf must be at least four feet high, and trenches on either side at least three feet wide at the top and three feet deep; and what is commonly called a worm fence, must be five feet to the top rail, and the corners must be locked with strong rails, poles or stakes.

In case of trespass by horses, cattle or other stock, or hog, shoat or pig, upon an inclosure inclosed by a legal hedge or fence, the owner of the animal is liable for the first trespass to pay the actual damage, for the second trespass double damages, and for the third offence, the party injured may kill the beasts so trespassing, without being answerable for the same. But if the person damnified for the want of a sufficient fence or hedge, shall hurt or kill any such animal, or cause the same to be injured or killed, he is required to satisfy the owner of such animal in double damages, with costs.

The statute further provides that no division fence or part of a fence, by which the lands of different owners are inclosed, shall be removed without the mutual consent of said owners, unless the party desiring to remove said fence shall first give six months'

notice, in writing, to the owner or owners of his intention to remove the said fence; and after the expiration of the time of said notice, he may remove the same (1 *Wagner's Stat.*, ch. 71, §§ 1-7).

From the fact that the right of the party to kill trespassing animals is given by statute, to enable him to justify such killing, he must bring himself strictly and exactly within the provisions of the statute (*Earby v. Fleming*, 16 *Mo. R.*, 154; *vide Canefox v. Crenshaw*, 24 *ib.*, 199; *Houx v. Seat*, 26 *ib.*, 178).

There is another provision of the statute under which a party who has a good and substantial fence erected on the line of his land, and the person owning the lands adjoining, shall make or cause to be made an inclosure on the opposite side of such fence, so that the same may answer the purpose of inclosing his field or inclosure, may require the payment of one-half the value of so much of the fence as may serve as a partition fence. And if the parties fail to agree as to the value of such fence, the statute provides a way by which the matter shall be fixed by three disinterested freeholders of the town.

The statute further requires every person owning a part of a partition fence, to keep the same in good repair, and any person refusing or neglecting to keep his or her portion of any such fence in good condition, is made liable for double damages which any party may sustain from such refusal or neglect to keep the same in repair. In case parties cannot agree in dividing or apportioning any division fence, provision is made for settling the same (1 *Wagner's Stat.*, ch. 57).

It is held that by the law of Missouri, the owners of cattle are under no obligation to fence them in, and damages cannot be recovered for the trespasses of such cattle, unless the fields trespassed upon were legally inclosed (*Gorman v. The Pacific Railroad Company*, 26 *Mo. R.*, 441).

In a case before the Supreme Court of the State, it appeared that two adjoining proprietors of land built a partition fence with an agreement that each one should have the portion of the fence he should make, and one of the proprietors built his fence over the line and on the land of the other, who sold his tract to a purchaser who had no notice of such agreement. The court held that the purchaser was entitled to the fence (*Olimer v. Wallace*, 28 *Mo. R.*, 556). But in another later case, the same court held

that, where one of two coterminous proprietors erects a division fence, and, by mistake, places it on the other's land, he is entitled to remove it to the true line within a reasonable time after discovering the mistake (*Matson v. Calhoun*, 44 Mo. R., 368).

The Supreme Court of Missouri has held, that it is not the duty of a landowner to fence against animals *feræ naturæ*, but the owner of such animals must keep them at his peril, and he is liable for damage done by them on another's land, whether fenced or not (*Canefox v. Crenshaw*, 24 Mo. R., 199). And it is here held by the same court, that a license of the grantor of lands to erect partition fences is not binding on a grantee without notice, and is revoked by the conveyance (*Houx v. Seat*, 26 Mo. R., 178).

The Supreme Court of the State has recently held that a railroad company is, under the laws of Missouri, liable for injuries to horses, cattle, etc., only when it appears that the animal injured entered on the road, in consequence of the absence of fences or cattle-guards, at a point on the line of the road, which the company was bound to secure in that manner (*Cecil v. Pacific Railroad Company*, 47 Mo. R., 246). And the same court has even more recently held, that the legislature has the power to require a railroad company to fence in the land adjoining their track; that such a statute is not unconstitutional as subjecting one person to expense for the sole benefit of another; that its main and leading object is the protection of the public, and that the protection of the property of adjacent proprietors is merely an incidental object (*Trice v. Hannibal, etc. Railroad Company*, 49 Mo. R., 438).

In an action against a railroad company for killing a cow on its track, the proof showed that the accident occurred within the limits of a town corporation, as shown by the paper plat of the town, but in fact away from any street, and in an open prairie. The town corporation had been dissolved or suspended. The Supreme Court of Missouri held, that the railroad company was liable for the actual damages arising from a failure to fence the track at the point of the accident, without proof of other negligence (*Iba v. The Hannibal, etc. Railroad Company*, 45 Mo. R., 469). But the same court has recently held, that the liability imposed by the Missouri General Statutes of 1865, chapter 63, section 43, upon a railroad company failing to fence its tracks, for "double the amount of all damages which shall be done by its

agents, engines or cars, to horses, cattle, mules or other animals " on the road, is only incurred where the animal is directly injured ; as, by being run over ; that the statute does not extend to a case where the animal, which has strayed upon the track through a defect in the fence, becomes frightened by the approach of a train, and is injured in jumping off the track. And it was declared that such a statute should be construed so as to effect its objects ; and that one main object is to protect passengers from the danger of collisions with animals (*Lafferty v. The Hannibal, etc. Railroad Company*, 44 Mo. R., 291).

In the State of Kansas, the statute requires that all fields and inclosures shall be inclosed with a fence sufficiently close, composed of posts and rails, posts and palings, posts and planks or palisades, posts and wire, rails alone, laid up in the manner commonly called a worm fence, or turf, with ditches on each side, of stone, or a hedge, composed either of thorn or osage orange. All fences composed of posts and rails, posts and palings, posts and planks or palisades, or posts and wire, must be at least four and one-half feet high ; those of turf must be at least four feet high, and staked and ridged, with a ditch on either side at least three feet wide at the top, and three feet deep ; a worm fence must be at least four and one-half feet high to the top of the rider ; or if not ridged, it must be locked with strong rails, posts or stakes. The bottom rail, board or plank in any fence must not be more than two feet from the ground, in any township ; and in those townships where hogs are not prohibited from running at large, it must not be more than six inches from the ground ; and all such fences are required to be substantially built, and sufficiently close to prevent stock from going through. Fences composed of stone must be four feet high, and at least eighteen inches wide at the bottom, and twelve inches wide at the top, and hedges must be of such height and thickness as will be sufficient to protect the field or inclosure. Post and wire fences must be constructed of posts of ordinary size for fencing purposes, and set in the ground at least two feet deep, and not more than twelve feet apart, with holes through the posts, or staples on the side, not more than fifteen inches apart, to admit four separate strands of fence wire, not smaller than number nine, and must be provided with rollers and levers, at suitable distances, to strain and hold the wire straight and firm. All such fences, and all brooks, rivers, creeks

ditches and constructions equivalent thereto, in the judgment of the fence-viewers within whose jurisdiction the same may be, are deemed legal and sufficient fences (*Gen. Stat. of 1868, ch. 40, art. 1*).

It is further declared by the statute that the trustee, clerk and treasurer in each township in the State shall be fence-viewers in such township, any two of whom are authorized to discharge the duties of such officers under the act, and they are required, when requested, to view any fence and perform any duty required of them under the act, under a penalty of ten dollars for any neglect, and liability to the party injured in consequence of such neglect. Each fence-viewer is entitled to two dollars per day for the time necessarily employed (*Gen. Stat., ch. 40, art. 2*).

The statute further provides that the owners of adjoining lands shall keep up and maintain in good repair all partition fences between them, in equal shares, so long as both parties continue to occupy or improve such lands, unless otherwise agreed. If any party neglect to repair or rebuild a partition fence, or the portion thereof which he ought to maintain, the aggrieved party may complain to the fence-viewers, who, after due notice to each party, must examine the same, and if they determine the fence to be insufficient, they must signify it in writing, to the delinquent and direct him to repair or rebuild the same within such time as they may judge reasonable. And if such fence be not repaired or rebuilt as required, the complainant may do the work, and on the fence being adjudged sufficient by the fence-viewers, and the value thereof ascertained by such fence-viewers, he may recover the same of such delinquent. All controversies respecting partition fences must be settled by the fence-viewers, and their determination will be binding on the parties. All assignments of the fence-viewers must be certified and signed by them, and must contain a certain description of the lands divided by such partition fence, and the names of the owners thereof. The owners may also agree in respect to their fences, but the agreement must be acknowledged or proved as conveyances of land, and recorded in the office of the register of deeds of the proper county. Provision is also made for a party building more than his share of a partition fence before any complaint made to the fence-viewers, may recover its value. All partition fences must be kept in good repair throughout the year, unless the owners of the land otherwise agree. No

person not wishing his land inclosed, not using it otherwise than in common, can be required to contribute to erect or maintain a partition fence, and where lands owned in severalty have been inclosed in common without a partition fence, and one of the owners is desirous to occupy his land in severalty, and the other refuses to divide the line where the fence should be built, and build his part of such fence, the party so desiring may apply to the fence-viewers and have the matter adjusted. Where one party may desire to throw his land open and leave it uninclosed, he may remove his portion of the division fence, unless the adjoining owner or occupant will, within two months after the same shall be ascertained, pay therefor the sum found and ascertained by the fence-viewers. And no person not improving his land adjoining a partition fence that may have been divided, will be required to keep a partition fence, provided he shall give six months' notice of his determination not to improve his land, to the adjoining owners or occupants, but the notice can only be served between the first day of July and the first of October, and he may thereafter remove his portion of the fence, unless the adjoining owner will pay him the value thereof as before provided. When land which has been uninclosed is inclosed, the owner thereof is required to pay for one-half of each partition fence between his land and the adjoining lands, the value to be ascertained and certified by the fence-viewers, in case the parties do not agree. And if the party neglects to pay the value of the fence for sixty days, the owner of the partition fence may recover the same by action.

Where the line upon which a partition fence is to be made is the boundary line between townships, the division of the fence must be made by the fence-viewers of the two townships. A partition fence may be laid upon the line, partly upon one side and partly on the other side (*Gen. Stat., ch. 40, art. 3*).

Any person liable to contribute to the erection of a partition fence, neglecting or refusing to make or maintain the same, is not allowed to have and maintain any action for damages incurred, but will be liable to pay to the party injured all damages which shall accrue to his lands and crops, fruit trees and shrubbery thereon, and fixtures connected with said land, to be assessed by the fence-viewers. And where any horse, mule or ass, or any neat-cattle, hogs or sheep, or other domestic animals, shall break into any inclosure, the owner or occupant may apply to the fence-

viewers, and have the same examined and damages assessed, which may be recovered by a civil action, and the assessment of the fence-viewers is made *prima facie* evidence of the amount of damages.

Where a fence has been built by mistake upon the land of another, the owner may remove it on to the line within six months after the line has been run, but he is required to pay any damage to the soil of the other party by reason of such fence. But it cannot be thus removed if it was made of timber or other material taken from the land on which it is built, until the owner of the timber is paid the value thereof; nor can it be removed at a time when it will throw open or expose the crop of the other party, and not until a reasonable time has expired after the crop is secured. Animals breaking into an inclosure sufficiently fenced may be taken up and restrained until the damages, and costs of keeping them are paid, and any person or corporation who shall injure any domestic animal upon premises not inclosed, is required to pay the damages (*Gen. Stat., ch. 40, art. 4*).

Osage orange plants set out, not less than one year old, around any piece of ground, not more than 160 acres, not less than ten acres of which shall be occupied and cultivated, is declared a lawful fence, by the statute, and provisions are made as to how such hedges shall be cultivated and the like, and damages to such hedges by domestic animals may be recovered in the manner prescribed by the statute (*Gen. Stat., ch. 40, act approved March 3d, 1868*).

It has been declared by the Supreme Court of the State, that the effect of the Kansas statute, relating to inclosures is, that before a person can recover for injuries done to his crops by roving stock, he must protect such crops by a lawful fence. Failing to have such fence, he is deemed by the law to be so negligent of his property that he cannot recover damages for trespass thereon, occasioned by reason of the defective fence. It seems to be the object of the law to permit stock to run at large on the prairie and relieve the owners from an action for damages, should they wander upon the land of another, unprotected by a lawful fence (*Larkin v. Taylor, 5 Kansas R., 433*). But the Supreme Court of the State has held, that, although the Kansas legislature, by enacting certain fence laws, and laws regulating the running at large of stock, have impliedly declared that no action shall lie for

injuries done to real estate by roaming cattle, unless such fence be made; they have not enacted any law giving to a person rights upon another's land, whether it be fenced or not (*Union Pacific Railroad Company v. Rollins*, 5 *Kans. R.*, 167; and *vide Culkins v. Mathews*, *Ib.*, 191; *Maltby v. Dihel*, *Ib.*, 430). And the same court has recently held that, in a township in which the hog law of the State has not been suspended, it is no defense to an action for damages done to a crop by hogs suffered to run at large, that the crop is not inclosed by a legal and sufficient fence. In such case, it is declared, there is no necessity of applying to the fence-viewers for a certificate and assessment of damages (*Wells v. Beal*, 9 *Kansas R.*, 597).

In the State of Nebraska, adjoining occupants or owners of land are required, each, to maintain a just proportion of the division fence between them, except the owner of either of the adjoining lands chooses to let his lands lie open; in which case, if he afterward inclose his lands, he is required to pay to the adjoining owner, if his lands are inclosed, a just proportion of the value of the division fence, or he must immediately build his proportion of such division fence; all which matters may be determined by any two fence-viewers of the precinct. And all disputes arising between owners of adjoining lands are to be settled by the fence-viewers of the county, who are required in such case to distinctly mark and define the proportion of the fence to be made or maintained by each. The decision of the fence-viewers must be reduced to writing and filed in the office of the county clerk.

If any person liable to contribute to the erection or reparation of a division fence, shall neglect or refuse, for the space of four weeks after notice in writing so to do, to make and maintain his proportion of such fence, the party injured may make or repair the same at the expense of the delinquent party, to be recovered by him with costs of suit; and such delinquent is also made liable to the party injured for all damages which shall accrue by such delinquency, to be determined by any two fence-viewers selected by the parties as in other cases of dispute.

Any person disposed to do so, may remove his portion of any division fence, at any time between the first day of December and April, by giving the adjoining owner sixty days' previous notice of his intention to do so. But if he shall remove such fence

without giving the notice, he is made liable to the adjoining owner for any damage he may sustain by reason thereof.

Whenever a division fence shall be destroyed by fire, floods or other casualty, the same must be rebuilt by the parties bound to do so, within ten days after being notified in writing so to do by the adverse party; and if he neglects to build the same as required, the party injured may do so at the expense of the delinquent party, to be recovered with cost of suit. Fence-viewers may examine witnesses on all questions submitted to them. In all organized counties, justices of the peace are *ex officio* fence-viewers of the county.

Structures used to inclose lands are deemed lawful fences by the statute of Nebraska in the following cases: A rail fence consisting of six rails, secured by stakes at the end of each panel, well set in the ground, with a rider upon the stakes; a board fence, consisting of not less than three boards of at least five inches in width and one inch thick, well secured to posts not more than eight feet apart; a rail and post fence consisting of three rails, well secured at each end to posts, not more than seven feet apart; a wire fence consisting of four wires of number nine fencing wire secured to posts not over one rod apart, with a stake between each two posts to which the wire shall be attached; such fences all being five and one-half feet in height, in their construction, the spaces between the boards, etc., must not be more than one foot; a hedge fence of osage orange consisting of one row of plants eight inches apart at the surface of the ground; a hedge fence of willow or other trees consisting of one row standing not more than fifteen inches apart at the surface of the ground, and two and one-half inches in diameter and six feet in height; and a fence known as "Warner's Patent," four and a half feet high, consisting of five boards, five inches wide, and one inch thick. The owner of domestic animals trespassing upon lands inclosed by a lawful fence is liable for the damages. And if any person sow grain, or plant a crop, without inclosing the same with a sufficient fence, he is made liable for all damages in consequence thereof, except in those counties where animals are restrained from running at large by legislative enactment (*Gen. Stat. of 1873, ch. 2, §§ 18-38*).*

* A correspondent of the Chicago Times, writing from Nebraska City, under date of November 18th, 1873, affirms that in Nebraska, under the general law of the State, they fence cattle in, rather than out, and that they are not "con

Railroad corporations are required to fence their roads by the Nebraska statutes, and for their neglect to do so, are made liable for all damage (*Gen. Stat., ch. 2, § 145*). And the statute makes it a criminal offense to injure or destroy any fence inclosure (*Gen. Stat., ch. 58, § 103*).

By the statutes of Nevada, if any horse, mule, jack, jenny, hog, sheep, goat, or any head of neat-cattle, shall break into any grounds inclosed by a lawful fence, the owner or manager of such animal is made liable to the owner of the premises for the actual damage, and for a second or subsequent offense for double damages. But no person is justified in injuring any trespassing animals, but the owner of lands on which animals may be found trespassing may take such animals up and keep them at the expense of the owner, after due notice, as provided by the act, and have the same disposed of to pay the damages and expenses.

Where two or more persons shall cultivate lands under one inclosure, neither of them can lawfully place or cause to be placed any animal on his or her ground, to the injury or damage of the other party, under penalty of paying actual damage for the first offense, and for every subsequent repetition, double damages, to be recovered in any court having jurisdiction (*2 Compiled Laws of 1873, pages 459, 460*). These seem to be the only provisions of the statutes of Nevada upon the subject of fences, found by reference to the alphabetical index of the compiled laws of the State, from which it would seem, that no person is *peremptorily*

strained by law to make fences," around their cultivated lands. On the contrary, he declares that "every owner of live stock is required by the statute to keep his animals 'herded' by day and 'corralled' or penned up at night." This he regards, in a prairie State, as of vast advantage, and he says that it is satisfactory to the people resident there, and "attractive to those seeking new homes, because it directly spares them an unprofitable, unproductive outlay of money." This policy may prevail in those counties where "animals are restrained from running at large by legislative enactment;" but by the general law of the State, it would seem that any person sowing or planting a field without inclosing it with a lawful fence, is liable for the consequences resulting from his neglect so to fence. In this case, therefore, the person sowing or planting his field is essentially "constrained by law" to build a fence around his cultivated land. Doubtless, it would be a great saving to agriculturists in the country, if the fencing system could be abolished, unless an equal outlay was incurred in some other way. Whether it would be cheaper in the end for farmers to keep their animals "herded" by day and "corralled" at night, than to fence the cattle out of their cultivated fields, may be a question.

required to maintain fences about his lands, but if parties neglect to maintain *partition* fences, they must take care of their stock, and *inferentially*, it would seem that no person could recover damage for cattle trespassing upon lands not inclosed. The statute speaks of a "lawful fence," but it does not appear to define what shall be deemed such.

In the State of Oregon, any person who shall willfully break down or destroy any fence or hedge not his own, or inclosing land not his own, upon conviction thereof, is liable to be imprisoned in the county jail, not less than three months, nor more than one year, or by a fine not less than ten dollars, nor more than \$500 (*Gen. Laws, Criminal Code, ch. 44, § 570*). And in case fence rails shall be removed by high water and lodged upon the lands of another, the owner of such rails may proceed and take them away, unless the proprietor of the land where they are thus lodged refuse his consent to his removing them, in which case, the right to such rails may be settled by arbitration (*Gen. Laws, ch. 16, tit. 4*). There are no other provisions respecting fences in the State of Oregon to be found by reference to the alphabetical index to the compiled laws of the State, and if there are none, the common law upon the subject, will doubtless be regarded as in force there.

In the State of California, every inclosure is deemed a lawful fence, which is four and a half feet high, if made of stone; and if made of rails, five and a half feet high; if made upon the embankment of a ditch three feet high from the bottom of the ditch, the fence must be two feet high; said fence to be substantial and reasonably strong, and made so close that stock cannot get their heads through it, and if made to turn small stock, sufficiently tight to keep such stock out. A hedge is considered a lawful fence if five feet high and sufficiently close to turn stock. If any horses, mules, jacks, jennies, hogs, sheep, goats, or any head of neat-cattle shall break into any grounds inclosed by a lawful fence, the owners of such animals are made liable to the owner of said premises for all damages, and if the trespass is repeated by neglect of the owners, for the second offense, they are liable to pay double damages. Damage done to animals upon lands uninclosed with a legal fence by the owner, the person doing the same is made liable for.

Lawful fences in the State are described as follows: Wire fence

made with posts, not less than twelve inches in circumference, set in the ground not less than eighteen inches, and not more than eight feet apart, with not less than three horizontal wires, each one-fourth of an inch in diameter, the first eighteen inches from the ground, the other two above this one, at intervals of one foot between each, all well stretched and securely fastened from one post to the other, with one rail, slat, pole or plank of suitable size and strength, securely fastened to the post not less than four and a half feet from the ground. Post and rail fence made of posts of the same size and at the same distance apart, and the same depth in the ground as above, with three rails, slats or planks of suitable size and strength, the top one to be four feet and a half from the ground, the other two at equal distances between the first and the ground and securely fastened to the post; a picket fence of the same height as the others, made of pickets, each not less than six inches in circumference, not more than six inches apart, driven in the ground not less than ten inches, all well secured at the top by slats or caps. Ditch and pole fence must be made of a ditch not less than four feet wide on top, and three feet deep, embankment thrown upon the inside of the ditch, with substantial posts set in the embankment not more than eight feet apart, and a plank, pole, rail or slat securely fastened to said posts, at least five feet high from the bottom of the ditch. Pole fence four and a half feet high, with stakes not less than three inches in diameter, set in the ground not less than eighteen inches, and where the stakes are placed seven feet apart, there must be not less than six horizontal poles well secured to the stakes; if the stakes are six feet apart, five poles; if three or four feet, four poles; if two feet apart, three poles, and the stakes need not be less than two inches in diameter, if one foot apart, one pole, and stakes need not be more than two inches in diameter, so long as the stakes and poles are securely fastened and in a fair state of preservation. Hedge fence is deemed lawful where, by reliable evidence, it is proved equal in strength, and as well suited to the protection of inclosed lands as the other fences described. A brush fence four and a half feet high, and twelve inches wide, with stakes not less than two inches in diameter, set in the ground not less than eighteen inches, one on each side, every third foot tied together at the top, with one horizontal pole tied to the outside stake five feet from the ground. And any other fence which by

reliable evidence, shall be declared as strong, substantial, and as well suited to the protection of inclosures as the other fences named, is declared lawful, except in the counties of Sorrena, Nepa, El Dorado, Yuba, and Maria, in which counties the law varies the kinds of fences a little, and also allows a worm fence of certain make.

Where a fence has been erected by any person on the line of his land, and the opposite owner shall make an inclosure, so that such fence shall answer for both grounds, the latter is required to pay for one-half the fence erected, as aforesaid. Partition fences are to be erected by the parties equally, and to be placed on the line of the lands as near as practicable, and if one party refuses or neglects to build his share, provision is made for the other party to build the whole and recover half the value of the same of the other, but no such fences are necessary except the lands are inclosed. Certain counties of the State are excepted out of this provision of the statute. Where necessary such partition fences must be maintained throughout the year. If the fence gets out of repair, and the proper party neglects to repair it, the other party may give the notice specified in the statute, and repair the same and recover the value of the delinquent party. There are statutes of a special character affecting certain specified counties, varying the rules binding in other parts of the State, which need not be referred to here (1 *Gen. Laws of 1864*, §§ 3029-3062).

Another provision of the statute makes a fence constructed of posts of a reasonable size and strength, firmly set in the ground, not more than twelve feet apart, if a rail or picket fence, and not more than eight feet apart, if a plank fence, the rails or plank of reasonable size and strength, securely fastened to the posts to the height of four and a half feet and reasonably close; if a picket fence, the pickets of ordinary size and strength, strongly nailed to a rail above and one below, or driven into the ground and nailed to a rail above reasonably close, and four and a half feet high; if a ditch, the ditch three and a half feet wide at the top and three feet deep, the embankment being on one side of the inclosure, with a rail, plank or picket fence on the embankment, to the height of three feet; or any other kind of fence equivalent in height, quality and strength, a lawful fence; and owners of animals trespassing on lands inclosed with a lawful fence are liable for the damages (1 *Gen. Laws*, §§ 3047, 3048). And by another

act, any person willfully or maliciously tearing down fences to make a passage through an inclosure is liable to be indicted for a misdemeanor, and punishable by a fine not less than fifty dollars nor more than \$500 (*Laws of 1871-2, ch. 280, § 2*).

The Supreme Court of the State has held that a person cannot recover for injuries done by another's cattle breaking into his close, unless such close be inclosed by a fence such as is prescribed by statute, or at least by one equivalent thereto, in its capacity to exclude them (*Comerford v. Dupuy, 17 Cal. R., 308*). And the same court has more recently held, that the California acts (*Statute of 1861, 523, and of 1867-8, 426*) restricting the herding of sheep, were not intended to prohibit the free, voluntary ranging at large of sheep over and upon uninclosed public or private lands. That they were intended to prohibit persons, owning or having the charge of sheep, from driving them to and collecting them upon the uninclosed lands of another. Where sheep, without the knowledge of the owner, stray into uninclosed fields, the owner is held not to be liable for the injury done by them (*Logan v. Gedney, 38 Cal. R., 579*).

In respect to the obligation of railroad corporations to fence their roads in California, the Supreme Court of the State has recently declared that, where an unfenced line of railroad passes through a field, in which the live stock of the owner or occupier of the field are running, and such stock stray upon the road and are killed, *prima facie*, the company is liable for the damage by reason of negligence. And it was held that a railroad company which continues running its cars upon an open track, undertakes, at its peril, that no harm shall come to the stock running in the field through which the road runs, for the want of a proper fence (*McCoy v. California, etc. Railroad Company, 40 Cal. R., 532*). And the same court has also held, that the act of 1861, requiring railroad companies in California to make and maintain a good and sufficient fence on both sides of its property, not prescribing any standard of sufficiency, must be considered as adopting the standard established by the act of 1855; that the provisions of a statute requiring a railroad company to maintain fences on the sides of its track is a provision designed for the protection of adjoining owners, and that such provision may be waived by the latter, and thus exonerate the company from liability for injuries resulting to cattle in consequence of the fence not being such as is

required by the statute (*Enright v. The San Francisco, etc. Rail-Company*, 33 Cal. R., 230).

CHAPTER XLI.

STATUTES OF THE SEVERAL STATES RESPECTING FENCES — LAWS OF NORTH CAROLINA, SOUTH CAROLINA, GEORGIA, FLORIDA AND ALABAMA — STATUTES AND DECISIONS OF THE COURTS UPON THE SUBJECT.

IN the State of North Carolina, there seems to be a general statute requiring every planter to make a sufficient fence about his cleared ground, under cultivation, at least five feet high, unless where there shall be some navigable stream or deep water-course that shall be sufficient, instead of such fence, and prescribing rules and remedies in case of damage, by reason of insufficient fences (*Revised Code*, ch. 48). And there are local statutes making certain rivers and streams lawful fences, and empowering the county commissioners in specified cases to make other rivers and streams lawful fences (*Laws of 1873*, ch. 98). And in other cases there are statutes providing that the qualified voters of certain localities may determine whether or not they will be under the fence laws of the State, and if they decide for "no fence," then the fence laws cease to be in force within the limits of such localities, and the owners must take care of their stock at their peril (*Laws of 1871*, ch. 187; and *vide Laws of 1873*, ch. 193). The general rule, however, in the State is, that where two or more persons shall have lands adjoining, which shall be either cultivated or as a pasture for stock by the respective owners of each piece of land, each shall make and maintain the one-half of the fence upon the dividing line; and rules are prescribed for cases where one owner chooses to neither cultivate his land, nor to pasture the same, nor to permit his stock to run on it, but afterward concludes to do one or the other, is allowed to do so on payment of a portion of the value of the line fence (*Laws of 1869*, ch. 275). The foregoing are substantially the provisions of the statutes of North Carolina now in force upon the subject of fences in the State, excepting the statutes forbidding the removal of fences under certain circumstances, and making it an indictable offense

to do so, and the like (*Vide Laws of 1847, ch. 70; Rev. Code, ch. 34, § 103*).

A case of considerable interest lately came before the Supreme Court of North Carolina in respect to fences, although not involving any particular principle under the laws of the State upon that subject. The case was this: Adjacent landowners agreed to build a rail fence on their line; Whitfield, the plaintiff, the eastern half, and Bodenhammer, the defendant, the western. The defendant, inadvertently, or to get a better location, placed a part of his altogether on the plaintiff's land. Afterward he gave the plaintiff a notice in writing that he intended on a certain day to have his land surveyed, and to set his fence on his own land, and that the plaintiff might attend and see it done. The surveyor not coming on that day, another day was set but before it arrived, the defendant removed his fence; on the appointed day the parties made the survey. The court held that the plaintiff could not maintain trespass *quare clausum fregit* for such removal; and that there was no showing of a license from the plaintiff for the removal of the fence (*Whitfield v. Bodenhammer, Phillips' Law R., 362*).

The courts of the State have held that the phrase "cleared ground under cultivation," employed in the North Carolina Revised Code, chapter 48, section 1, requiring a fence five feet high around such ground, does not embrace "pasture field," and it was said in the case, that the provisions protecting pastures, whether cleared or uncleared, are found in section 133 of chapter 34 of the Code (*The State v. Perry, 64 N. C. R., 305*). But it has been held, that a planter, who has not a fence, as required by law, about his cultivated field, nor any navigable or deep water to serve instead thereof, is not entitled to recover for a trespass committed by domestic animals on a field thus unprotected (*Jones v. Witherspoon, 7 Jones' Law R., 555*). It seems that the report of the freeholders in a proceeding under the statute concerning fences, contained in the Revised Code of North Carolina, chapter 48, section 3, should embrace only damages for the particular injury complained of in the warrant, and the judgment of the magistrate should be for such damages only (*Bailey v. Bryan, 3 Jones' Law R., 357*). And it was held that, under the act of 1777, regulating the proceedings for damages by the inroads of cattle and other animals, the report of the justices and freeholders

on the state of the plaintiff's fences is conclusive on the parties (*Nelson v. Stewart*, 2 *Murphey's R.*, 298). Where hogs escape into the grounds of tenants in common through the insufficiency of their fences, and are killed or maimed by them or a part of them, it has been held that the actual perpetrators of the acts are individually liable even under the North Carolina statute of 1831, contained in chapter 48 of the Revised Statutes (*McKay v. Woodle*, 6 *Ired. R.*, 352).

It has been held that one who removes a fence from his own land, unlawfully put there by another, although it partially inclosed a cultivated field of the latter, is not indictable under chapter 34, section 103, of the Revised Code (*The State v. Headrick*, 3 *Jones' Law R.*, 375). And it has also been held that the act which forbids the removal of fences, etc., does not extend to persons in the rightful possession of the premises, as *quasi* tenants, occupying the same by the consent of the owner (*The State v. Williams*, *Busbee's Law R.*, 197). But it has been held that a person may be convicted on an indictment under the statute, if it appear that the ground, which the fence surrounded, was in a course of preparation for making a crop, or used in the course of husbandry, though no crop was actually planted or growing on it at the time of such removal (*The State v. Allen*, 13 *Ired. R.*, 36). It was held that all persons, and not planters only, are subject to indictment for not keeping up good fences, as required by the thirty-fourth and thirty-eighth chapters of the Revised Statutes of the State (*The State v. Bell*, 3 *Ired. R.*, 506).

Where a person has neither possession of land, nor the right of possession to it, upon an indictment for unlawfully removing a fence therefrom, he cannot raise a question as to his right of entry, or defend by showing that he did the act to bring on a civil suit to try title (*The State v. Graham*, 8 *Jones' Law R.*, 397). And it has been held that, where a person was indicted for having an insufficient fence during crop time in North Carolina, the sufficiency of a pond or water-course to answer the purpose of a fence was a question for the court, and where it appeared that a water-course had been passed over by hogs and other stock, the opinion of the court below, that the same was insufficient as a fence, was sustained (*The State v. Lamb*, 8 *Ired. R.*, 229).

The Supreme Court has decided that it is not the duty of the owners of cattle in North Carolina, to keep them within inclo-

tures, so as to prevent them from trespassing upon the lands of others (*Laws v. The North Carolina Railroad Company*, 7 *Jones' Law R.*, 468). And it is held that railroad companies are liable for the damage done to cattle feeding near, and crossing their roads, except they use due care to prevent the accident (*Aycock v. Railroad Company*, 6 *Jones' Law R.*, 231; but *vide Montgomery v. The Wilmington, etc. Railroad Company*, *Ib.*, 464).

By the statutes of South Carolina, all fences strongly and closely made of rails, boards, or posts and rails, or of an embankment of earth capped with rails or timber of any sort, or live hedges, five feet in height, measured from the level, are deemed lawful fences. And every planter is bound to keep such lawful fences around his cultivated grounds, except where some navigable stream or deep water-course shall be a boundary of such cultivated grounds, in which case, such stream is deemed a sufficient fence. Provided, that before one can avail himself of this latter regulation, he shall apply to a magistrate of the district or parish, who is required, from the names of seven freeholders of the vicinage, to draw by lot, three, who must view the premises, and pronounce upon the sufficiency of the said water as an inclosure, according to the true intent of the act.

Horses, mules, cattle, hogs, sheep or goats, breaking into any field, having a crop of any kind growing or ungathered, with a lawful fence, may be seized and kept confined until notice is given to the owner, within twenty-four hours of the seizure, who shall be bound to pay the owner of such field, fifty cents a head for each horse or mule, and twenty-five cents per head for every head of cattle, hogs, etc., before he shall be entitled to have such animal delivered up to him. And for the second breaking, within one month after the first, the owner is made liable to the person injured, for all damages sustained, in addition to the fine aforesaid, to be recovered by action of trespass, in which case the plaintiff will be entitled to his full costs, if the verdict or decree shall exceed four dollars. But the verdict is required to be for the defendant if it shall appear that the fence was not a lawful one. And where any person whose fields are not inclosed by a lawful fence shall kill or otherwise injure animals found in such unin-closed field, he is made subject to an action of trespass in favor of the owner of the animals, and the plaintiff in the action may

recover full satisfaction for the injury, with costs, if the verdict exceed four dollars (6 *Stat. at Large*, No. 2430).

Planters and others having corn or other provision fields are required to maintain a fence around such fields six feet high, and no person is permitted to have canes or stalks in any of his inclosures, that may injure horses or cattle under the penalty of the sum of forty shillings for every fault. If any horse or neat beast or cattle shall break through a sufficient fence or be found in an inclosure with a sufficient fence, the owner of the inclosure may apply to a justice of the peace before whom proceedings may be had for the appraisement of the damage; and for the second fault of such beast in the same inclosure, the said justice is required to give execution double what the damages shall be appraised at (2 *Stat. at Large*, No. 108).

In an early case before the South Carolina courts, it appeared that the plaintiff erected a partition fence on the line dividing his land from that of the adjoining proprietor, after requesting the said proprietor to join in the building thereof, which he refused to do, in the city of Charleston; and afterward, on the refusal of the owner of the same land adjoining to pay any part of the expense thereof, brought assumpsit for a contribution, or a moiety of the expense, and gave in evidence a local custom of the place, entitling the builder of a party wall or fence to recover half the expense of erecting the same, and had a verdict. On appeal, it was held by a majority of the court to be a good custom, and the verdict was sustained (*Walker v. Chichester*, 2 *Brevard's R.*, 67).

It has been held by the courts of the State, that the killing of cattle on a railroad track by a train of cars, is *prima facie* proof of negligence on the part of the company (*Danner v. The South Carolina Railroad Company*, 4 *Rich. Law R.*, 329). And it has been decided that this rule applies to the killing of a horse at night; and it was declared, that, according to the laws of South Carolina, cattle should be fenced out, and not fenced in; that the entry, therefore, of cattle or a horse, on an uninclosed railroad track, is no trespass (*Murray v. The South Carolina Railroad Company*, 10 *Rich. Law R.*, 227). But it was held that the principle laid down in *Danner's Case*, *supra*, does not apply to the killing of a dog (*Wilson v. The Wilmington and Man. Railroad Company*, 10 *Rich. Law R.*, 52).

In the State of Georgia, the statute provides that all fences or

inclosures, commonly called worm fences, shall be five feet high, with or without being staked and ridged, and from the ground to the height of three feet, the rails must not be more than four inches apart, and all paling fences must be of the same height, and the poles not more than two inches apart. Any inclosure, made by means of a ditch or trench, is required to be three feet wide and two feet deep; and if made of both fence and ditch, the latter must be four feet wide, and the fence five feet high from the bottom of the ditch. If any trespass is committed in any inclosure, not being protected by such a fence, no damage can be recovered therefor; and if cattle trespass upon lands lawfully fenced, they must not be killed or injured for the first breaking in of any such animal, and not until after notice is given to the owner or agent, if possible, although the owner of the animal, in such case, will be liable for double the damage done by his stock.

All water-courses that are or have been navigable, as far as navigation has ever extended up said streams, are deemed fences, whenever, by reason of freshets, or otherwise, fences cannot be kept on such streams, subject to the rules applicable to other fences.

No horse, mule, cow or hog, or any other animal used or fit for food or labor, is permitted to run at large beyond the limits of the lands of the owner or manager of the same; and for a violation of this provision of the statute, the owner of the animal trespassing is made liable to make full satisfaction for the damage (*Code of 1873, ch. 9, §§ 1443-1451*). Provision is also made for impounding animals trespassing and the proceedings in such case are pointed out by the statute (*Code, ch. 9, §§ 1451-1455*). And the pulling down or removing any fence, paling or inclosure of another, without the consent of the owner, is made an indictable offense (*Code, § 4440*).

The Supreme Court of the State has decided that, if a party kill stock that has strayed into his uninclosed river bottoms he is liable therefor under a statute in force in the State of Georgia (*Cantrell v. Alderholt, 28 Ga. R., 239*).

By an act of the legislature of Georgia passed in 1847, it is declared that "the several railroad companies of the State shall be held liable in law for any damage done to live stock or other property;" and to escape this it would seem to be almost indispensably necessary that the roads should be substantially fenced.

Notwithstanding the unqualified terms of the statute, the Supreme Court of the State has held, that railroad corporations are not liable for damages caused by design or negligence of the owner of the stock (*Macon and W. Railroad v. Davis*, 13 *Ga. R.*, 68). The Supreme Court has, since the case in the 13th Georgia was decided, held that section five of the act of 1847, is repealed by the statute of 1854 with the same title (*Jones v. Central Railroad and Bank*, 21 *Ga. R.*, 104). And the same court has recently held, that in actions against railroad companies for damages to animals astray upon their track, the burden of proof is on the plaintiffs to show that the defendants are chargeable with negligence (*Georgia Railroad, etc. Company v. Anderson*, 33 *Ga. R.*, 110). And it was held in the same case, that an award of land damages, showing that the owner of the land received compensation for increased expense of fencing, incurred by reason of the construction of the railroad, is competent evidence in defense of an action for killing his animals which have strayed over the fence upon the track; this evidence, it was observed, tends to show the owner of the animals liable for the consequences of defect of fences (*Georgia Railroad, etc. Company v. Anderson*, 33 *Ga. R.*, 110).

In the State of Florida, all fences or inclosures commonly called worm, log, or post and railing fences, erected and made around or about any garden, orchard, plantation or settlement, must be five feet high, well staked or ridered, or otherwise must be five feet high, and locked or braced at the corners, and from the ground to the height of three feet, the rails or logs must not be more than four inches apart, except in case of paling, the poles must not be more than two inches asunder. If the fence is made with a trench or ditch, the same must be four feet wide, and the fence five feet high from the bottom of the ditch, and three feet high from the top of the bank. Owners of cattle are not liable for trespass on lands not lawfully fenced. No planter is permitted to fix or cause to be fixed in any of his inclosures, not lawfully fenced, any canes or stakes, or any thing that may kill, maim or injure any cattle, horse, sheep, goats or swine, under penalty of ten dollars for every offense (*Thompson's Digest*, ch. 5).

In Alabama, all inclosures and fences must be five feet high, and if made of rails, well staked and ridered, or otherwise sufficiently locked, and from the ground to the height of every three

feet, the rails not more than four inches apart, and if made of palings, the palings not more than three inches apart, or if made with a ditch, such ditch must be four feet wide at the top, and the fence of whatever material composed, at least five feet high from the bottom of the ditch, and three feet from the top of the bank, and so close as to prevent stock of any kind from getting through. No damages can be recovered for trespasses of animals on lands not inclosed with a lawful fence, and where the land is not thus inclosed, no person must set in his inclosure any stakes, pits, poison, or any thing which may injure or kill any animal or stock, under a penalty of fifty dollars for every such act, and where such stakes, pits, poisons, etc., are found on such inclosures, they are made presumptive evidence that they were set by the person in charge of the land. But if stock trespass on land legally inclosed, the owner is liable for the damage, and the statute prescribes the method of proceeding to have the damage assessed. All partition fences between improved lands are to be maintained at the joint expense of the occupants. And if any person uses a fence as a partition fence erected by another, he is required to pay his proportion of the value of the same, to be ascertained by three disinterested freeholders of the precinct summoned by a justice of the peace as provided by the statute (*Revised Code of 1867, tit. 13, ch. 8*).

The Supreme Court of Alabama has decided, that a partition fence between adjoining proprietors is, under the statute of the State, the joint property of both, and that each is bound to keep the entire fence in good repair, that one tenant cannot therefore maintain an action of trespass against the other, for an injury consequent upon an insufficient fence. But if the fence is out of repair, and one of the proprietors will not aid in repairing it, the other may cause it to be done, and recover the value before the appropriate tribunal, although viewers have not been appointed by the county court. It was also held in the case before the court, that if the proprietors enter into an agreement, one to keep up one-half the fence, and the other, the other half, an action of trespass cannot be maintained by one against the other, for an injury caused by an insufficient fence, but that the remedy is for a breach of the contract (*Walker v. Watrous, 8 Ala. R., 493*).

In a much latter case than *Walker v. Watrous*, the same court reiterated the doctrine, that by the common law, a tenant of a

close is not bound to fence against an adjoining close, unless by force of prescription; and that where no prescription or agreement exists, the legal obligation of the tenants of adjoining lands to make and maintain partition fences, depends entirely upon statutory provisions. And it was held that the statute of Alabama on the subject of partition fences, does not restrict a tenant's right to let his own lands lie open; he being responsible in damages for his cattle breaking into any grounds which are inclosed with a lawful fence. It was further declared, that the fact that some panels of the defendant's outside fence were down, though not conclusive evidence that his lot was uninclosed, is nevertheless evidence whose weight should be left to the consideration of the jury in ascertaining that fact. It was decided, that if the defendant's lot is in possession of a trespasser, or of one claiming title in himself or a third person, the defendant is not liable for the erection or repairs of a partition fence; but if he consents, as owner, to the erection of the fence, and it is made by the adjoining proprietor upon the consent thus given, he is estopped from denying his liability; and that in an action to recover one-half of the expense of a partition fence, the actual interest which the parties have in the fence is a question which cannot arise (*Moore v. Levert*, 24 Ala. R., 310). And it has been held in a still later case, that the recognition of the parties, as a partition fence, of a structure which is built entirely on the land of one proprietor, operates as an estoppel *in pais*, and prevents either from complaining of any act done by the other, which would have been lawful if the fence had been on the division line, and that each one has a right to enter on the land of the other for the purpose of repairing it. But it was held, that if a gate erected therein is also recognized as a part of the partition fence, the right to repair it as a fence does not authorize its destruction as a gate; and that one entering for the latter purpose is not protected by the statute (*Henry v. Jones*, 28 Ala. R., 385).

It has been held, that the mere negligence of a servant, acting in the ordinary business of the defendant, his master, will not authorize a recovery, although the damage to the plaintiff's stock actually resulted from such negligence, and although an action on the case at common law would lie to recover damages for such injuries. It was declared that the statute of the State which gives double damages for injuries to stock (*Clay's Dig.* 241, § 3), is

highly penal in its character, and must be strictly construed; and to authorize a recovery under the statute, it must be shown that the defendant's fence was insufficient, and that the injury to the plaintiff's stock arose out of some act of the defendant done or commanded or directed to be done by him (*Smith v. Cansey*, 22 Ala. R., 568).

It has been held by the Supreme Court of Alabama, that the act of the legislature of the State passed in 1852 (*Pamphlet Acts*, 1851, 1852, page 45), "to regulate and define the liability of railroad companies," does not conflict with the act of 1850 (*Pamphlet Acts*, 1849, 1850, page 171), granting the right of way through Jackson county to the Nashville and Chattanooga Railroad Company, and it was held, that to entitle the plaintiff to recover against a railroad company under the act of 1852, it is only necessary for him to prove property in the stock or cattle killed, their value, and that they were killed by the defendant's cars or locomotives. But whether any degree of care and diligence on the part of the defendant will excuse the act of killing the stock or cattle, was left in doubt by the court under a *quære*. But it was expressly declared that the fact that the cattle were killed while roaming on the lands which did not belong to the owner, is no defense to the action, because the doctrine of the common law in relation to *damage-feasant* has never been adopted in the State (*The Nashville and Chattanooga Railroad Company v. Peacock*, 25 Ala. R., 229).

The Supreme Court of the State has recently decided that, under the Alabama Revised Code, railroad companies are liable for damages for killing or injuring stock by their locomotives and cars if they fail to comply with the requirements of caution which are therein prescribed, if such compliance is within the power of their engineers and agents. Where compliance with the requirements is not possible, the company can escape liability only by showing that its agents or servants used all the means in their power, under the circumstances, known to skillful engineers, to prevent the injury complained of (*Mobile, etc. Railroad Company v. Malone*, 46 Ala. R., 391).

CHAPTER XLII.

STATUTES OF THE SEVERAL STATES RESPECTING FENCES — LAWS OF KENTUCKY, TENNESSEE, MISSISSIPPI, LOUISIANA, ARKANSAS AND TEXAS — STATUTES AND DECISIONS OF THE COURTS UPON THE SUBJECT.

IN the State of Kentucky, every strong and sound fence of rails or plank or iron, five feet high, and being so close that cattle or other stock cannot creep through, or made of stone or brick, four and one-half feet high, or a ditch three feet deep and three feet broad, with a hedge two feet high, or a rail, plank, stone or brick fence two and a half feet high on the margin thereof, the hedge or fence being so close that cattle cannot creep through, is declared by statute to be a lawful fence. If cattle trespass upon grounds inclosed by a lawful fence, the owner or manager of the cattle is made liable, for the first breach, to pay the actual damage, and for every subsequent breach, double the actual damages sustained. And in case of a subsequent trespass by the same cattle, after the owner thereof has had five days' notice, in writing, of the two previous trespasses, the owner of the inclosure may kill the cattle and recover treble damages for the third or subsequent breach (*Gen. Stat. of 1873, ch. 55, art. 1*).

As a foundation for the legislation respecting fences in the State, the Court of Appeals of Kentucky have recently decided, that the legislature of a State has the constitutional power to regulate, by statute, the relative rights and responsibilities of the proprietors of inclosed land and the owners of stock going at large or kept in adjacent inclosures (*Wills v. Walters, 5 Bush's R., 351*). And the same court, at an earlier day, in giving a construction to a regulation concerning fences in the State, held that a town ordinance, providing that a person, joining a division fence to one already put up, should pay one-half the value of the fence to which he joins, does not render an owner of a lot liable for one-half the value of a fence put up by the owner of the adjoining lot, in place of the old division fence (*M'Millen v. Wilson, 3 Dana's R., 154*).

The Court of Appeals of Kentucky have held, that in an action claiming double damages under the statute against a person for

killing a horse which had entered a field not inclosed by a lawful fence, the charge is sustained by proof that the defendant used and controlled the premises, although not the owner. And it was held in the same case, that in such an action it was error to instruct the jury that the defendant was not liable for damages, if he did what other prudent men might have done (*Jones v. Hood*, 4 *Bush's R.*, 80).

The statute of Kentucky further provides that where a partition fence has existed by agreement or acquiescence between two or more persons, neither party can legally remove the same without the consent of the others, except between the first of December and first of March ensuing; nor unless three months' notice in writing shall have been previously given to the opposite party by the person desiring to make the same. Wherever a partition fence exists, each party thereto is required to keep a lawful fence on his proportion of the line; and in case he fails to do so he is made liable for all damages the other party may sustain by reason of trespasses over such division fence; and after a reasonable notice to repair the same, the other party may repair the same at the expense of the delinquent.

Persons owning adjoining lands may agree in regard to the erection of division fences between them, and the keeping of the same in repair. And if the cattle of the one shall pass over or through such division fence, and go upon the lands of the other, at any point at which he is bound to keep in repair, he is made responsible for the damage. If the owner or bailee of cattle shall have a lawful fence, and his cattle shall break through or pass over his fence, and go upon the premises of another, not inclosed by a lawful fence, he will not be responsible for the damages of the first trespass, but will be for any subsequent trespass (*Gen. Stat.*, ch. 55, arts. 2-4).

The Court of Appeals of the State have recently held that, under the statutes of Kentucky, regulating division fences, one of two adjoining landowners cannot recover from the other damages for injuries done by domestic animals owned by the other which have strayed upon his land, if he himself is in fault in any respect for the insufficiency of the fence between them (*Wills v. Walters*, 5 *Bush's R.*, 351). And the same court have also recently held, that a notice of removal of a portion of a division fence, and partial severance within the period required by the act, answers the

object of the law, and if a violation thereof, will only subject the owner to nominal damages (*Gwinn v. Ditto*, 3 *Bush's R.*, 547).

In respect to the obligations of railway corporations to fence their roads in Kentucky, the statutes of the State seem to be silent, and the Court of Appeals have held, that where the owner of land grants to a railroad company permission to construct its road through his land, and no agreement is made in regard to fencing it, the company is not responsible for the destruction of cattle, allowed by the owner to run in the field, by the locomotive, unless the injury could have been avoided by the company's agents, with due regard to the safety of the train and its contents (*Louisville and Frankfort Railroad Company v. Milton*, 14 *B. Monroe's R.*, 75). And the same court have also held that, in the absence of any showing of negligence, unskillfulness, defective machinery, or recklessness, a railroad company is not responsible for the value of a mule, which jumps the fence, upon the track only fifty yards ahead of a running train; otherwise, had the distance been such that the engineer could see and save the mule (*Louisville, etc. Railroad Company v. Wainscott*, 3 *Bush's R.*, 149). And it has been held by the same court, that the paramount duty of a railroad company through its agents intrusted with the conduct of a train, is to look to the safety of the persons and property thereon; subordinate to which is the duty to avoid unnecessary injury to animals straying upon the road. But it was held that a railroad company which is not bound to fence its track is not liable for injuries inflicted by its engines and trains upon cattle, etc., straying upon the track of the road, unless such injury was caused by the wanton and reckless negligence of the company, or its agents or servants (*Louisville, etc. Railroad Company v. Ballard*, 2 *Metcalfe's R.*, 177). The same court have also recently held, that the legislature, in creating a railroad corporation and during its existence, has the undoubted right to increase or lessen the liability of the company in regard to injuries to stock committed upon its road by the company or its agents (*O'Bannon v. Louisville, etc. Railroad Company*, 8 *Bush's R.*, 348).

In the State of Tennessee, every planter is required to make a sufficient fence about his cleared land in cultivation, at least five feet high, and so close, for at least three feet from the surface of the earth, as to prevent hogs from passing through the same; and

where any trespass shall have been committed by horses, cattle or hogs, on the cleared and cultivated ground of any person, he may complain to a justice of the peace of the county, who is required to cause two resident and impartial freeholders to be summoned, who are to examine as to the sufficiency of the fence of the complainant, and the damage sustained, and certify the result, under their hands and seals and the hand and seal of the justice, which must be delivered to the complainant. If it appear that the fence was sufficient, the owner of the animal must make full satisfaction, and the damage may be recovered by action, in which the justice and freeholder's certificate, is made *prima facie* evidence of the plaintiff's demand. But if it appear that the fence was insufficient no damages can be recovered, and no person will be justified in killing or injuring animals trespassing on lands not inclosed by a sufficient fence.

Partition fences are to be erected and repaired at the joint expense of the occupants; or if any person make a fence a partition fence, by joining of it, or using it as such, he is required to pay the person erecting it his proportion of the expense, to be determined by three disinterested freeholders, summoned by a justice of the peace, in case the parties cannot agree as to the same, and the like proceedings are to be had in cases where partition fences are rebuilt or repaired by either of the joint proprietors, the jury of view being judges of the necessity or advisability of the improvement (*Code of 1858, ch. 3*). And any person who shall willfully and wantonly break or throw down, mar, deface or otherwise injure any fence, hedge or ditch, inclosing the land of another, is liable to be indicted for a misdemeanor (*Code, § 4652, as amended by Laws of 1870-71, ch. 36, § 3*).

In a late case before the Supreme Court of the State, it appeared that the dividing lane between two proprietors was, by mutual consent, closed, the owners each removing one-half of his fence, and joining the remaining pieces. The court held that the fence formed by the junction of the remaining parts was, within the meaning of the Code, a partition fence, and subject to the regulations of the laws applicable to partition fences. It was further decided in the case that the death of the original owners of such lands does not annul the contract, but that it is binding upon their heirs, and if either party determines to remove his half of the partition fence, he must give the other the legal notice of such inten

tion. If he remove the fence without giving notice, he is liable as a trespasser. And it was declared that an executor, without authority to sell, has not such an interest in the land as will make him the proper person to whom notice of the intention to move the fence should be given (*Stallcup v. Bradley*, 3 *Coldwell's R.*, 406).

In one case before the same court, the action was trespass *vi et armis* for removing the plaintiff's fence. The circuit judge charged that the main question was, where the line between the parties ran, and upon whose side of it the alleged trespass was committed. If on the defendant's side, he had a right to move the fence; otherwise if on the plaintiff's side. If the jury should find the fence to be on the true division line between the parties, and that it was made and maintained jointly by both, then the defendant had a right to remove his portion upon giving the plaintiff reasonable notice. The court held, that in the absence of any prayer for special instructions, there was in this charge no error of which the defendant could complain (*Clowers v. Sawyers*, 1 *Head's R.*, 156).

In respect to the liability of railroad companies in Tennessee for injuries to animals straying upon their track, the Supreme Court of the State has decided that the provisions of sections 1166, 1169 of the Code, that where it is established that stock has been killed or injured by a railroad company, the *onus* is upon the company of showing that the injury was the result of unavoidable accident, is simply the announcement of a common-law principle (*Home v. The Memphis, etc. Railroad Company*, 1 *Coldwell's R.*, 72).

In Mississippi, all fences five feet high, substantially and closely built with plank, pickets, hedges or other good material, and which are strong and close enough to exclude domestic animals of ordinary habits and disposition, are taken and considered as lawful fences, as long as they are kept in good repair. A fence which is constructed by making a strong embankment of earth two feet and a half high, with sufficient base, and erecting thereon a fence of common rails, planks, pickets or hedges the same height above the embankment, closely and substantially built, so as to exclude ordinary stock; and a fence made of common rails, and built in the form known as a worm fence, and which is six feet high, built of good, sound and heavy rails, well lapped and locked, and close

enough to exclude ordinary domestic animals, are also to be taken and considered as lawful fences, as long as they are kept in good repair.

Persons owning adjoining land, or lots of land, or being lessees thereof for more than two years, are bound to contribute equally to the maintaining of fences on the line dividing the land or lots, if they are used for the purposes of cultivation or depasturing stock, or inclosed for any other purpose, although any person in such cases, who may prefer to build the fence on his own land, and leave a lane on his own land, may be excused from building any portion of the division fence, provided he builds his own fence within sixty days after he shall give notice of his intention to build the fence on his own land as aforesaid. In case a party bound to contribute to the erection or repair of a division fence shall neglect to do so, after being notified by the adverse proprietor for that purpose, such adverse proprietor may construct the whole fence, and the delinquent will be bound to pay one-half the value thereof, to be ascertained in the manner prescribed in the act; and all partition fences are to be owned jointly by the respective proprietors. Where, from natural impediments, a line fence is impracticable on the line, the line may be departed from on either side, but the fence will notwithstanding, be a partition fence (*Revised Stat. of 1870, ch. 33, §§ 1905-1915*).

The Supreme Court of the State has recently decided, that the mere fact, that stock is wandering on an uninclosed railroad track, does not justify the agents or servants of the railroad company in regarding such stock as being unlawfully there, or relieve them from the obligation to use proper precautions. And it was held, that if the stock is injured, through the mismanagement or neglect of such agents or servants, the company is liable (*Raiford v. Mississippi, etc. Railroad Company, 43 Miss. R., 233*). And the same court has also declared, that the right of a railroad corporation to the exclusive use of its track will not prevent it from being liable in damages for injury done to cattle on the track, where such injury could have been avoided by reasonable skill and care. And it appeared that cattle, pastured in uninclosed lands, adjacent to the track of a railroad, strayed upon the track, there being no fence, and were run over by the cars and killed; the court held, that the cattle were not trespassing upon the track, so as to deprive the owner of his remedy against the railroad corpora-

tion (*Vicksburg and Jackson Railroad Company v. Patten*, 31 *Miss. R.*, 156). The rule seems to be, that one who seeks to recover damages from a railroad company, for injury done to his stock while ranging on the track of such railroad, must, under the provisions of the Revised Code of Mississippi, show that the injury resulted from some mismanagement or neglect on the part of the servants or agents of the company (*Memphis, etc. Railroad Company v. Blakeney*, 43 *Miss. R.*, 218; *Same v. Orr*, *Ib.*, 279).

In the State of Louisiana provisions are made for the building and support of walls in the cities and towns or their suburbs, and every one has a right in such cities, towns or suburbs, to compel his neighbors to contribute to the making and repairing of the fences held in common, by which their houses, yards and gardens are separated, which must be made in the manner prescribed by the regulations of the police. In the country the common boundary inclosures between two estates are made at the expense of the adjacent estates, if the estates are inclosed; otherwise, the estate which is not inclosed is not bound to contribute to it. And every fence, which separates rural estates, is considered as a boundary inclosure, unless there be but one of the estates inclosed, or unless there be some title or proof to the contrary. Every ditch between two estates is supposed to be held in common, unless there be a voucher or proof to the contrary, and must be kept at the expense of the two contiguous proprietors (*Revised Civil Code of 1870, ch. 3, §1, arts. 675-690*). These provisions of the statute are quite simple, and they need no commentary to aid in understanding their meaning and effect.

In respect to the liability of railway companies in Louisiana for damages to animals upon their track, the Supreme Court of the State has declared, that in an action brought to recover the value of cattle killed on a railroad track by the cars, the plaintiff is as much bound to prove the fact of gross negligence and want of care on the part of the company or its agents, as he is to prove the fact of the killing. And it was held in the case before the court, that the rights, duties and obligations of the New Orleans, Opelousas, and Great Western Railroad Company, are created by express law, and until the legislature shall, by statute, require the company to inclose its road or shall delegate the power to the parochial authorities, and they shall exercise the same, the company will be under no obligation to inclose its road, or any part

thereof, with fences or barriers. It was accordingly held, that if cattle stray upon the track of this road and be killed or maimed by accident, it will be *damnum absque injuria*, and the owner will have the loss to bear (*Knight v. The New Orleans, etc. Railroad Company*, 15 *La. Annual R.*, 105).

By the statutes of Arkansas, all fields and grounds kept for inclosures are required to be inclosed with a fence sufficiently close, composed of sufficient posts and rails, posts and paling, palisades, or rails alone, laid up in the manner commonly called worm fence; all fences composed of rails alone are required to be five feet high, and the other fences specified must be five feet high, and the posts deeply and firmly set in the earth. The sufficiency of any fence is to be determined by persons summoned to view the same as provided by the act. The owners of beasts trespassing upon inclosures sufficiently fenced, are required to make reparation to the party injured for the true value of the damages, and for every subsequent trespass for double damages; for the third offense the beast may be killed. But no person is justified for killing or injuring any animal trespassing on lands not sufficiently fenced; and whenever the sufficiency of a fence is in dispute, the same must be determined by three disinterested householders of the neighborhood, summoned by a justice. Where any person shall inclose any land adjoining another's land already inclosed with a fence, so that any part of the fence first made becomes the partition fence between them, in such case, the charge of such division fence, as far as it is inclosed on both sides, must be equally borne and maintained by both parties (*Rev. Stat.*, *ch.* 76; *Digest of 1858*, *ch.* 87). And any landlord who shall fail to make or cause to be made his fence or inclosure around his land which may be in cultivation in conformity with the act, is made guilty of a misdemeanor (*Laws of 1873*, *ch.* 96).

And finally, in the State of Texas, every person is required to make a sufficient fence about his cleared land in cultivation, at least five feet high, and make such fence sufficiently close to prevent hogs from passing through the same, not leaving a space of more than six inches in any one place, for at least three feet from the ground. And for trespasses on such lands thus inclosed, by animals, the owner of the land may recover the damages, which may be assessed by two disinterested freeholders on the summons of a justice of the peace, and if any person not having a lawful

fence, shall injure stock found on his land, he is made liable to make full satisfaction (*Paschal's Annotated Digest*, 639, 640).

The Supreme Court has held by a majority judgment, that in an action brought to recover damages from a railroad company for injury done to cattle by its train while crossing its track, the burden is on the plaintiff to prove negligence on the part of the company. Wheeler, Ch. J., dissented, and held that in such a case the *presumption* was against the company, and it was called upon to excuse itself from culpable blame. But the majority of the judges held otherwise, and their opinion stands as the judgment of the court (*Bethje v. Houston, etc. Railroad Company*, 26 *Texas R.*, 604).

This closes the examination of the statutory policy of the several States relating to fences, and it will have been observed that all of the States have laws recognizing in some way the obligations to fence; in some, the statutes are limited to regulating the subject of division or line fences, while in others, the statute provides for inside and outside fences as well. The principles of the common law in relation to fences are fully recognized in some of the States, and in others, and perhaps in a majority, the common law is in force, with modifications, while in a few, the English common law is discarded altogether. There is a sameness in the statutes of some of the States, though usually differing in essential particulars; but the policy is sufficiently uniform as to make the decisions of the courts in one State, in some respects, authority in others.

CHAPTER XLIII.

THE RIGHTS AND LIABILITIES OF LANDLORDS AND TENANTS IN RESPECT TO THE FENCES ON THE DEMISED PROPERTY—RIGHTS OF THE TENANT IN HEDGES, BUSHES AND OTHER FENCES ON THE DEMISED PROPERTY—LIABILITY TO REPAIR FENCES AS BETWEEN LANDLORD AND TENANT—COVENANTS TO KEEP FENCES IN REPAIR.

THE subject of making and repairing fences upon demised property is usually regulated by the terms of the lease under which the property is held; and it may be pertinent here to remark that there are two well established principles relating to the construc-

tion of leases, as well as other written instruments. The first is, that in construing a covenant or restriction, where there is no doubt or ambiguity, it must be most favorable to the party in whose favor the covenant or restriction is made, and most strongly against the party covenanting or imposing a restriction upon himself. This is a well settled elementary principle, and has been several times referred to in the first part of this treatise. The second principle is, that all covenants or restrictions contained in a lease or deed are to be presumed to continue for the whole duration of the estate created, unless the contrary manifestly appears (*Gifford v. The First Presbyterian Society of Syracuse*, 56 Barb. R., 114).

If there be no special agreement or covenant in the lease respecting the repairs of the fences upon the demised premises, the obligation then rests upon the actual occupant or the tenant. Lord Kenyon, in an early case in the English Court of King's Bench, said "that the action for non-repair of fences could not be brought against the owner of the inheritance, where it was in the possession of another person. That it was so notoriously the duty of the actual occupier to repair the fences, and so little the duty of the landlord, that, without any agreement to that effect, the landlord might maintain an action against his tenant for omitting to repair, upon the ground of the injury done to the inheritance; and deplorable indeed, he said, would be the situation of landlords, if they were liable to be harassed with actions for the culpable neglect of their tenants" (*Cheetham v. Hampson*, 4 Term R., 318; *Rex v. Watts*, 1 Selk. R., 357).

These remarks show, in the absence of positive agreement upon this subject, not only the obligations of the tenant as to his landlord, but his obligations in this respect as to third parties. It would seem that, ordinarily, the action brought to recover damages for an injury arising from the fences of property being out of repair, should be brought against the occupier of the premises for the time being, and such are the authorities (*Vide Russell v. Sheaton*, 3 Queen's Bench R., 449; *Mills v. Holten*, 2 Hurl. & Nev. R., 14). But if the wrong causing the damages arises from the malfeasance or misfeasance of the landlord, he may be sued instead of the tenant (*Todd v. Flight*, 9 Com. Bench R., N. S., 377, 389). For example, if the landlord has taken the burden of repairing the premises upon himself, and has neglected his duty

in this regard, he may be sued instead of the tenant (*Payne v. Rogers*, 2 *H. Black. R.*, 348). The same rule would apply in case the landlord should let his premises in such a state that they must, under ordinary circumstances, become a nuisance to the public or to the adjoining owners (*Hunt on Fences*, 124, and cases there cited).

It has long been well settled by well recognized English authorities that a lessee for life or years has only a special interest and property in the fruit and shade of timber trees, so long as they are annexed to the land; but he has a general property in hedges, bushes and trees, which are not timber, and also in the cuttings of a hedge, whoever cuts it. If, therefore, the tenant suffers hedges or trees, not timber to be cut down or lopped, the property in such cuttings belongs to him (1 *Roll. Abr.*, 181). However, if he abuse his authority in this respect and grub up or destroy fences, whereby the identity of the property is destroyed and the inheritance injured, he may subject himself to an action in the nature of waste at the suit of the landlord, or he may be restrained by injunction (*Berriman v. Peacock*, 9 *Bing. R.*, 384). So if there be a quickset fence of white thorn, and the tenant stub it up or suffer it to be destroyed, for this and a like restriction an action in the nature of waste lies, although it is thought that the tenant may stub up bushes, furze and thorns for melioration, for this would be accounted good husbandry (*Coke on Litt.*, 53 a).

In a case in the English Court of Exchequer Chamber, an indenture of demise contained an exception of all timber, timber-like and other trees, bushes and thorns, other than such bushes and thorns as should be necessary for the repair of fences; and the lessee covenanted to keep the fences in repair during the term, finding all materials, except rough timber, stakes and bushes, which if growing on the premises, the lessor himself covenanted to provide. The court held, that the provision as to bushes and thorns necessary for repairs was not an exception out of the exception, but that all trees, bushes and thorns were excepted out of the demise, whether part of the fences or not, or whether necessary for repairs or not; and the court considered that the tenant could not take any of the said thorns and bushes for repairs, until they were set out to him by the landlord pursuant to his covenant (*Jenny v. Brook*, 6 *Queen's Bench R.*, 323).

It is the well settled doctrine of the English courts, that the mere relation of landlord and tenant is a sufficient consideration for the tenant's promise to manage his farm in a husbandlike manner, and that one of the duties devolving upon him in consequence of this implied promise, in the absence of any express agreement to the contrary is, that he shall maintain the fences of the property demised to him (*Vide Powley v. Walker*, 5 Term R., 373; *Cheetham v. Hampson*, 4 ib., 318). And for this purpose, as is declared by an old and approved elementary authority, the tenant is entitled to reasonable estovers, and may cut timber to keep the walls, pales, fences, hedges and ditches in the same state of repair in which he found them. But he cannot make new fences or other erections, without being liable for waste. If there is no proper wood on the premises for repairs, he is not obliged to purchase other wood, but is discharged from his liabilities in this respect (*Coke on Litt.*, 41 b; 53 a, 53 b). But it has been held by the English Court of King's Bench, that a plea to a declaration against a tenant for not using the premises demised to him in a husbandlike manner, and for not repairing fences, that there was no proper wood (without specifying it) which the defendant had a right to cut for repairs, and that the plaintiff ought to have set out proper wood, without averring any request or custom of the country in this respect, was bad (*Whitfield v. Weedon*, 2 Chitty's R., 685).

It seems that the question whether estovers are good or otherwise depends upon the application which is made of them, that is, whether they are applied to the benefit of the estate upon which they are cut. It is not competent for a tenant to cut down estovers on one estate and apply them in making repairs upon another (*Lee v. Alston*, 1 Bro. C. C., 196; S. C., 3 ib., 37). If he sell the timber cut, and with the produce pay the wages of workmen, or even if he exchange it for timber better suited for the repairs wanted, or better seasoned, according to the English authorities, he is liable to an action of waste (*Vide Lewis Bowle's Case*, 11 Coke's R., 79 b; *Simmons v. Norton*, 7 Bing. R., 640; *Attorney-General v. Stowell*, 2 Austr. R., 601; *Whitfield v. Bewit*, 2 P. Wms. R., 242; *Gower v. Eyre*, Cooper's C. C., 156). And he must not cut down timber for future repairs, nor for repairs which are wanted through his own default, for to cut timber to repair waste is double waste. But where the lord of a

manor brought an action of ejectment against a tenant for life for cutting down timber, which was not immediately applied in remedying existing defects, and was rather in excess of the quantity required, the court refused to disturb the verdict of a jury, which found that timber was cut *bona fide* for the purpose of making necessary repairs, and was intended to have been so applied in due course.

A lessee for life or years who takes reasonable estovers for repairing hedges and fences, is not chargeable with waste by reason of his having entered into an express covenant to repair at his own charge; or by reason of the lessor having covenanted to do the repairs himself. And where the lease contains a clause empowering the lessee to take hedge—bote by assignment, it appears that he may take it, although it be not assigned, for such a provision does not take away the power which the law gives him; but it is otherwise, if the lessee covenants negatively that he will not take the wood, until it is assigned to him by the lessor. These points have long been settled in England, and may be said to be almost elementary. The authorities are collected in Mr. Hunt's work on fences, but they need not be cited here. The principles are all as applicable in this country as in England (*Vide Hunt on Fences*, 128). According to the doctrine laid down in an early Massachusetts case, it is not waste for a tenant for life to cut down timber trees for the purpose of making necessary fences or repairs on the estate, and sell them, and purchase fencing material with the proceeds for such fences or repairs, provided this be proved to be the most economical mode of making the fences or repairs (*Loomis v. Wilber*, 5 *Mass. R.*, 13). In such cases, it is a question for the jury to decide, whether the trees were cut down for the purpose of repairing the fences upon the premises *bona fide*, and were in a course of application for that purpose. This was expressly laid down by Lord Ellenborough, C. J., in the English Court of King's Bench in the early part of the present century, and the rule is uniformly adopted both in England and in this country (*Doe, ex dem. Foley v. Wilson*, 11 *East's R.*, 56; and *vide Jackson v. Brownson*, 7 *Johns. R.*, 227; *McCay v. Wait*, 51 *Barb. R.*, 225). But although the tenant may be under obligation to keep up the fences upon the demised premises, and for the purpose of discharging the obligation, has a right to take the material for the fences from the land, he will not

be justified in going on and taking the same indiscriminately, without reference to what may best be spared for the purpose. In cases of wood for fire bote, it has been held that the tenant is first bound to cut the dry, fallen, or perishing wood, and the same *principle*, should govern the taking of timber for fencing material (*Vide Jackson v. Brownson*, 7 *Johns. R.*, 227).

The doctrine of the case of *Jackson v. Brownson* is, that a tenant for life of farming land is entitled to cut down and use so much of the standing timber on the farm, as may be necessary for fuel, for making and repairing fences and buildings; and if the land is wild and uncultivated, he may cut down so much of the timber as may be proper for the purposes of cultivation; but he may not remove it so far as to materially lessen the value of the inheritance. This doctrine has been expressly sanctioned by the Court of Appeals of the State of New York; but, of course, no timber should be cut which it is necessary to retain for the use of the farm, so long as there be other timber perishing, or otherwise sufficient for the maintaining of the fences upon the premises demised (*Vide Van Deusen v. Young*, 29 *N. Y. R.*, 9). A tenant for years has the right, as well as a tenant for life, to cut wood on the demised farm for fires and repairs, within the rules stated, provided always, that the quantity cut is not unreasonable (*Mather v. Sharpe*, 14 *Allen's R.*, 43). And, as suggested, it is well settled that a tenant for life, of farming land, is entitled to cut down and use so much of the timber on the farm, as may be necessary for fuel, and to keep up the buildings and fences; and while he must not be indiscriminate in his selection of the timber for use, he is under no obligation to use decaying timber and down trees, provided they are unfit for use or would cost more than their value to secure. The law does not demand such an unreasonable exercise of his privileges by the tenant, or impose so harsh a rule as that; and while it prohibits waste, it also permits a reasonable enjoyment of the rights which are conferred upon the tenant by the grant under which he holds (*Rutherford v. Aiken*, 2 *N. Y. S. C. R.*, 281). As has been before intimated, the tenant by virtue of his occupancy, is, as a rule, liable to third persons for the consequences resulting from a neglect to keep the fences upon the demised premises in repair, to the same extent that his landlord would be, if in possession himself (*Taylor v. Whitehead*, 2 *Doug. R.*, 745). Where the landlord has taken upon himself the burden

of keeping the fences in repair, the rule has been held different. But it must be remembered, that the lessor is never bound to keep the fences upon the demised premises in repair, except by force of an express contract or covenant so to do (*Brewster v. De Fremercy*, 33 *Cal. R.*, 341). And when he has bound himself to make such repairs, he cannot be made liable for their cost to the tenant, when made without giving any notice to the landlord to make them (*Fairot v. Mettler*, 21 *La. An. R.*, 220).

But where there is no stipulation between the parties to a lease on the subject of repairs, the tenant is bound to keep the premises in repair, and this doctrine extends to the subject of fences upon the premises demised (*Long v. Fitzsimmons*, 1 *Watts & Serg. R.*, 530). And unless a promise to repair be made by the landlord in consideration of the lease, the tenant cannot give evidence of it; or of a neglect by the landlord by way of set-off in a suit for rent (*Phillips v. Munger*, 4 *Wharton's R.*, 226, *but vide Caulk v. Everly*, 6 *ib.*, 303). It is never in the power of a tenant to make repairs at the expense of his landlord, unless there be a special agreement between them, authorizing him to do it. The tenant takes the premises for better and for worse, and cannot involve his landlord in expense for repairs, without his consent (*Mumford v. Brown*, 6 *Cow. R.*, 475, *and vide Brown v. Burlington*, 36 *Vt. R.*, 40; *Estep v. Estep*, 22 *Ind. R.*, 114). Upon a letting of real estate, lands or tenements, there is no implied warranty that they are fit for the use for which the lessee requires them. The maxim of *caveat emptor* applies to the contract of hiring real property, as it does to the transfer of all property real, personal or mixed, with one or two recognized exceptions (*McGlashan v. Tallmadge*, 37 *Barb. R.*, 313). And where there is no stipulation in the lease in respect to repairs, the tenant takes the risk of the future condition of the premises and is bound to keep them in repair, as before stated (*Libbey v. Tolferd*, 48 *Maine R.*, 316).

Sometimes the lessee is expressly bound by his covenants in the lease, to maintain the fences upon the demised premises, during the term. In such cases no doubt exists as to the liability and obligations of the tenant, although it sometimes becomes a question as to the *extent* of the liability. A covenant on the part of the lessees in a lease, "to keep the buildings and fences in good repair, except natural wear and tear," was recently held by the

Supreme Court of the State of New York to bind them to rebuild in case of accidental destruction by fire or otherwise. It was remarked by the court that some authorities hold that where the covenant by the lessee is to repair and leave the premises in the same state as he found or received them, or language to that effect, he is merely to use his best endeavors to keep them in the same tenable repair; and is not bound by such covenant to restore buildings or fences destroyed by fire or otherwise during the term, without his fault. But it was declared that where the covenant is to repair or keep in repair generally the buildings and fences, without the qualifying words mentioned, all the authorities hold that it requires the tenant to rebuild the fences, etc., in case of the accidental destruction of the same (*McIntosh v. Tower*, 49 Barb. R., 550, 555). This is the well settled doctrine of the courts. But in all the adjudicated cases where this liability has been held to attach to the lessee he has entered into an *express covenant to repair*, and a simple covenant on the part of the lessee to surrender up the premises at the expiration of the term in the same condition they are in at the date of the lease, natural wear and tear excepted, with no covenant to repair or rebuild, does not bind the tenant to rebuild fences in the place of others which have been destroyed by fire or other accidental causes during the term of the lease. In this latter case the tenant is merely required to use his best endeavors to keep the fences on the premises in the same state of repair as when he entered upon the lease. Natural and unavoidable decay is no breach of such a covenant; but a covenant to *repair generally* requires him to uphold the fences. This seems to be the doctrine of the courts, both in this country and in England (*Vide Hitchins v. Warner*, 5 Barb. R., 666, and the authorities cited by Sill, J., in giving the opinion of the court). It may be added that in all cases where the lessee is bound by the terms of his lease to keep up the fences upon the leasehold premises, his assignee is under the same obligation that he was prior to the assignment of the term. A covenant to keep the fences upon the leasehold premises in repair runs with the land; and such a covenant will descend to the heir of the covenantor, even though the heir is not named in the lease; and he may sue for any fresh breach thereof, if he is entitled to the reversion (*Lougher v. Williams*, 2 Lev. R., 92). And on a covenant to repair, on a breach thereof by the tenant or his assignee, the heir of the covenantee has the

action, though the premises were out of repair during the lifetime of the ancestor, and continued so afterward (*Vivian v. Campion*, 1 *Salk. R.*, 141 ; *S. C.*, 2 *Nev. & Mann. R.*, 550). And a covenant, on the part of the landlord, to renew the lease, cannot be enforced by the tenant or his assignee where there is a breach of the obligation to keep the fences in repair. For example, in a case before the Court of Exchequer of Ireland, where a bill was filed to compel the renewal of a lease, and it appeared that the fences upon the premises had not been kept up as required by the lease, the court held that the landlord was not bound to execute the renewal until the fences were put up by the tenant pursuant to the requirements of the lease (*Douglas v. McCausland, Hayes' R.*, 254). And the English Court of Chancery has frequently held that a tenant who has been guilty of a breach of the covenant to keep the premises demised in repair, for which the lessor has a right of reentry, is not entitled to a specific performance of an agreement for a lease, or of a covenant for renewal (*Hill v. Barclay*, 18 *Ves. R.*, 56 ; *White v. Warner*, 2 *Merivale's R.*, 459 ; and *vide Gourlay v. Duke of Somerset*, 1 *Ves. & Bea. R.*, 68 ; *Lovat v. Lord Ranelagh*, 3 *ib.*, 29).

The Law of Boundaries, Fences and
Window Lights.

PART III.

OF THE LAW OF WINDOW LIGHTS.

CHAPTER XLIV.

IMPORTANCE AND NATURE OF THE RIGHT TO LIGHT AND AIR—
SUGGESTIONS IN RESPECT TO THE RIGHT OF PROSPECT OR VIEW
AND PURE AIR—RIGHT TO WINDOW LIGHTS THE SAME IN CITY
AND COUNTRY.

THE right to the undisturbed enjoyment of property in houses and other buildings, and more especially that which pertains to the free access of light and air, has long been a subject of primary importance in the countries of the old world, but until within the last few years it has not been regarded with any peculiar interest in the American States, although it has now become, in this country, a subject of growing importance. When a country is new, and land is comparatively cheap, the disposition is small to crowd the buildings of a town or city into close proximity with each other, and, as a consequence, parties have little or no concern in respect to the obstruction of light and air. But, as the population increases, and land becomes more expensive, the desire is immediately apparent to crowd the buildings more closely together, and the subject of light and air becomes more important. The amazing rapidity with which cities have sprung up in certain portions of this continent, within the last five and twenty years, and the gigantic growth which has attended some of the older cities of this country, within the same period, together with the marvelous increase in the value of the lands upon which many of those cities are located, have made a thorough knowledge of the right to the enjoyment of light and air a matter most desirable, if not of abiding necessity. Cases have been occurring, more or less frequently, of late years, in the American courts, in which the law of window lights has been thoroughly examined, and the whole question elaborately discussed, so that a very satisfactory conclusion may be arrived at in respect to the principles by which the subject is governed.

The right to window lights is generally considered as the privilege which a party enjoys of having light and air transmitted over

the adjoining premises on to his own. By the Roman law, light and air were considered as some of those things which had the name of *res communes*, and which were defined to be "things, the property of which belongs to no person, but the use of all;" and they are so regarded by the English law. In this respect, light and air are placed in the same category with running water, which may be appropriated and enjoyed by every one as opportunity offers, but no one can acquire an absolute property in it. Upon this principle, it is obvious that no person can have the right to the possession of all the light and air which in all future time will pass over a given space. In other words, no one can acquire a permanent property in light and air; but the rather, the right to them consists in some obligation imposed on the owner of an adjoining space, to refrain from using the same so as to interfere with the light and air which will pass over it to the tenement to which the right is annexed. This obligation of the adjacent owner that he will not so use his own land as to obstruct the access of light and air to the adjoining house or other building, is one of that class of rights known to the law as easements, and an easement is defined by a popular English writer as "a privilege without profit which the owner of one neighboring tenement hath of another, existing in respect of their several tenants, by which the servient owner is obliged to suffer, or not to do something on his own land for the benefit of the dominant owner" (*Gale on Easements*, 3d ed., 5). Of course there must be two distinct tenements—the dominant, to which the right belongs, and the servient, on which the obligation is imposed—to constitute an easement. The right to window lights is regarded as a continuous easement. An easement is an incorporeal right, and Sir Edward Coke says, "that a thing incorporeal cannot be appurtenant or appendant to another thing incorporeal" (*Coke on Litt.*, 121 b). But Mr. Gale considers that the true test of what things can be appurtenant to what is the propriety of the relation between the principal and the adjunct, which may be found out by considering whether they so agree in nature or quality as to be capable of union without any incongruity (*Gale on Easements*, 9). Whatever may be thought of these opinions, it is very certain that this particular easement of the right to window lights, can only be claimed as accessory to a tenement. With that tenement the easement is transferred; and when that tene

ment is permanently destroyed, the easement ceases to exist (*Latham on Window Lights*, 8).

The right to window lights is altogether a different affair from the right sometimes claimed of prospect or the view of external objects. The English law has never regarded prospect as a right capable of being annexed to a tenement as an easement, and certainly it has never been so considered by the American law. Its enjoyment can only be secured by express covenant; and the burden of this will not run with the servient tenement. Said Wray, C. J., in a very old English case: "That for prospect, which is a matter only of delight and not of necessity, no action lies for stopping thereof, and yet it is a great recommendation of a house if it has a long and large prospect" (*Aldred's Case*, 9 *Coke's R.*, 57 *b*); and, in another early case, Twisden, J., said; "Why may I not build up a wall that another man may not look into my yard? Prospects may be stopped, so you do not darken the light" (*Knowles v. Richards*, 1 *Mod. R.*, 55; *S. C.*, 2 *Keb. R.*, 642). And Lord Hardwicke, in a case where the Court of Chancery was invoked to prevent the defendants from obstructing the plaintiffs' prospect, said: "You come in a very special and particular case on a particular right to a prospect. I know no general rule of common law which warrants that, or says, that building so as to stop another's prospect is a nuisance. Was that the case, there could be no great towns, and I must grant injunctions to all the new buildings in this town" (*Attorney-General v. Doughty*, 2 *Ves., Sen., R.*, 45). And in another case, the same eminent Lord High Chancellor said: "It is true that the value of the plaintiff's house may be reduced by rendering the prospect less pleasant, but that is no reason for binding a man from building on his own ground" (*Fishmongers' Company v. East India Company*, 1 *Dick. R.*, 163). And Lord Chancellor Cottenham observed: "It is not, as is said in one case, because the value of the property may be lessened, and it is not, as is said in another, because a pleasant prospect may be shut out, that the court is to interfere; it must be an injury very different in its nature and its origin to justify such an interference" (*Squire v. Campbell*, 1 *Mylne & Craig's R.*, 486). But it is needless to cite authorities to the contrary as none can be found, either English or American, to show that a right to prospect can exist, except by obligation founded in personal contract.

So also the right to window lights has no connection with the right sometimes attempted to be established of having the view from outside objects within a window secured from interruption. In cases of this kind the same rule applies as in the case of obstructing the view of external objects. Injury may be done to a tenement by reason of the erection of another in such a manner as to afford a view through the windows or openings of the former or *vice versa*; but if so, it is simply *injuria absque damnum*, an injury for which the law affords no remedy. Said Vice-chancellor Wood in a comparatively late case before the English Court of Chancery: "So far as a man standing outside the window would be prevented from getting a view of the goods thus exhibited, the case would stand on the same footing as an obstruction to light; a person must not cause an injury in creating such an obstruction. If a shopkeeper wished to show his goods within the shop, he had a right to the free access of light for the purpose, and he apprehended it was the same if he wished to show the goods outside by means of transparent medium. This, however, did not apply to the present case; all that could be complained of was that persons could not see the goods so soon as they might if the alterations objected to had not been made. When they came in front of the shop the goods would be seen just as well as before. So, if a sign were hung up in front of the shop, such as a pawnbroker's balls, which could be seen from a long distance, there was nothing to prevent a neighbor building on his own ground in such a way as to obstruct the direct view of such a sign" (*Smith v. Deven*, 35 *Law. R.*, *N. S.*, *Ch.* 317). And in a case before Kindersley, V. C., in which it was complained that the erection of a gasometer would shut out the view of the public from the plaintiff's premises, his honor observed: "As to the ground that the gasometer will prevent the view of persons in Ann's Place, it is impossible that that can be a ground for an injunction" (*Butt v. Imperial Gas-light and Coke Company*, 14 *Weekly Reporter*, 508). The result is that the owner of a tenement may possess the right to window lights, and yet have no power to prevent erections which simply interfere with his prospect, or which may impede the view of objects in the windows by passersby. And again, the windows of an adjacent tenement may command a view of the interior of the neighboring house, through the windows of the latter, so that the privacy of the tenement may be invaded and its value thereby lessened; but for this

the law gives no remedy, for it is not considered a wrong for which any redress is given.

It was observed in a comparatively recent case in the English Court of Chancery that "the court has nothing to do with the diminution of the value of a house caused by its windows being overlooked and its comparative privacy destroyed" (*Johnson v. Wyatt*, 2 *De Gex, J. & S. R.*, 18; *S. C.*, 33 *Law J. R.*, *N. S.*, *Ch.* 394). And it was observed by Blackburn, J., in a recent case before the English Court of Common Pleas: "It is quite true that the opening of a new widow looking into the grounds of another may not only annoy that neighbor, but may often affect the value of his property. But the law of England considers that no injury" (*Jones v. Tapling*, 12 *Com. Bench R.*, *N. S.*, 842; *S. C.*, 31 *Law J. R.*, *N. S. C. B.*, 354). There is a form of words sometimes found in the cases on this subject, viz., "invasion of privacy by opening windows;" but that is not treated by the law as a wrong for which any remedy is given. The builder of a house, however close it may be to his neighbor's land, however numerous its windows, is entitled to enjoy whatever light and air he can receive through its windows, and no one can complain of him for so doing.

It has sometimes been affirmed and argued that there is no analogy between the case of the right to water and the right to light and air. But there is more analogy between these than in the other cases considered. Indeed, it has sometimes been judicially declared, that there is as much a property in light and air as in water, or any thing else which one has a right to enjoy. Said Vice-chancellor Kindersly, in giving judgment in a case before him: "The plaintiff has a right to have his property protected; and on principle, the quantity of light which he has a right to receive from his ancient windows, as a servitude over a servient tenement, is as much a part of his property as land, or a house, or any other species of property" (*Martin v. Headon*, 2 *Law R. Eq.*, 425). It is nevertheless true, as has before stated, that light and air are things in which no permanent property can be gained, but that every man who has the opportunity may make use of and enjoy them, and may occupy them so long as the opportunity continues. But from the earliest period of English law, such occupancy when continued without interruption for a specified length of time, has drawn with it a right to the continu-

ance of the same enjoyment, and has imposed on the owner over whose land the access of light and air has been enjoyed the obligation of not making such a use of his land as to interfere with that enjoyment. "*Cujus est solum, ejus est usque ad cælum*," is a maxim of the English law, which is also recognized in this country; but this does not prevent the acquisition of the right to the enjoyment of light and air, under certain circumstances, by the adjacent proprietor, which may, to some extent, interfere with the right to deal with the land of the adverse owner in such manner as he may desire. "*Sic utere tuo, ut alieum non lædas*"—so use your own that you injure not another's property, is also a maxim of law supported by the soundest wisdom; and this may sometimes operate to prevent the use of one's premises in such a way as to deprive the adjacent tenement of the necessary access of light and air. It is a general rule that the owner of land may use it according to his pleasure; but the rule is subject to the qualification, that he is not at liberty to use it in such a manner as to infringe the rights of others. Upon this principle the right to the enjoyment of light and air is sometimes secured. Light and air are usually spoken of in the same connection, although they are quite distinct in their nature. The very fact of there being windows, which determine the right in question, shows that there may be the free admission of light without a particle of air, and yet the right to sufficient wholesome air has always been recognized. Although they be distinct, and though the light in questions of this kind has the pre-eminence, air is of little less consequence, yet the obstruction of air more properly comes under the head of nuisance, and is treated of as a question of evidence. The acquired right to unimpeded transmission of air must not be confused with the right which every man possesses at common law, to receive the air which has access to his premises free from pollution; a right which can only be excluded by the acquisition of a countervailing easement by the party who creates the nuisance (*Vide Bliss v. Hall*, 4 Bing., N. C., 186). The method by which the right to window lights may be acquired will be explained in subsequent chapters. It seems to be settled that a person living in the country has the same right to be protected from interference with his light, as an individual occupying a tenement in towns and cities; whether a house is in a city or in the country, or indeed, wherever it may be, the right of the

inhabitant to the comfortable and usual enjoyment of it is the same.

CHAPTER XLV.

THE METHODS BY WHICH THE RIGHT TO WINDOW LIGHTS MAY BE ACQUIRED—THE ENGLISH AUTHORITIES UPON THE SUBJECT, AND THE ENGLISH PRESCRIPTION ACT.

ACCORDING to the English policy, the right to window lights may be acquired in three different ways, by occupancy, by express agreement, and by implied agreement. The modern English doctrine on the subject of lights has never been fully sanctioned in the American States, and yet it will be impossible to obtain a correct view of the subject as administered here, without a full understanding of the general tenor of the English authorities. Indeed, the leading principles which govern the subject in Great Britain, are entirely applicable here, and must be well understood in order to determine similar cases arising in this country. The American authorities upon the subject will be considered in subsequent chapters.

The methods by which the right to window lights may be acquired in England are stated in a few words by Lord Hardwicke in a case before the English Court of Chancery, where he says: "If the house were built on the old foundation, it would entitle the plaintiffs' to their lights as an ancient messuage; but if on the new foundation, then the party must show a new agreement, or something to import one" (*The Fishmongers' Company v. The East India Company*, 1 Dick. R., 163). And again, in another case: "Whoever comes into this court, on such a right, must found it either on defendant's building so as to stop ancient lights, for which he has prescription (notwithstanding that he must lay a particular prescription), or else on some agreement, either proved, or reasonable prescription thereof" (*Morris v. Lessees of Lord Berkeley*, 2 Ves., Sen., R., 452).

The first in the division then is, the acquisition of the right by occupancy, and this branch of the subject has been elaborately considered by the English courts, and the doctrine inculcated, with

some qualification, has been expressly sanctioned by act of parliament. The sections of the act which relate to the acquisition of the right to window lights are as follows: "Where the access and use of light to and for any dwelling-house, workshop or other building that have been actually enjoyed therewith for the full period of twenty years, without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing. Each of these respective periods of years hereinbefore mentioned shall be deemed and taken to be the period meant before some suit or action, wherein the claim or matter to which such period may relate, shall have been or shall be brought into question; and no act or other matter shall be deemed to be an interruption, within the meaning of the statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made" (*Stat.*, 2 & 3 *Will.*, 4, c 71, §§ 3, 4). This act was passed in the year 1832, and is still in force. The object of the act was to shorten the period of prescription, and to make possession a bar or title of itself, instead of having recourse to the intervention of a jury to make it so. Prior to the passage of the act the enjoyment of lights with the party's acquiescence for twenty years was regarded as such decisive presumption of a right by grant or otherwise, that, unless contradicted or explained the jury were required to believe it; but no length of time could be said to be an absolute bar like a statute of limitation, though it was considered a presumptive bar which ought to go to a jury. Time immemorial itself is only presumptive evidence (*Vide Darwin v. Upton*, 2 *Wms'. Saund. R.*, 175, b, c). But since the passage of the act of 1832 the right to window lights acquired by occupancy has become a matter *juris positivi* depending on positive enactment, and is no longer to be rested on any supposed presumption of grant or fiction of a license.

Said Lord Westbury, C., in a celebrated case before the English House of Lords: "It is material to observe that the right to what is called an ancient light now depends upon positive enactment. It is matter *juris positivi* and does not require, and therefore ought not to be rested on any presumption of grant or fiction of

a license having been obtained from the adjoining proprietor. This observation is material, because I think it will be found that error in some decided cases has arisen from the fact of the courts treating the right as originating in a presumed grant or license." And said Lord Chelmsford in the same case: "The courts of law formerly held that where there had been an uninterrupted use of lights for twenty years, it was to be presumed that there was some grant of them by the neighboring owner, or, in other words, that he had by some agreement restricted himself in the otherwise lawful employment of his own land. The Prescription Act turned this presumption into an absolute right, founded upon user on one side and acquiescence on the other. It was argued that under the act the right to the enjoyment of lights was still made to rest on the footing of a grant; this position seems to me to be contrary to the express words of the statute. * * * By the Prescription Act, then, after twenty years' user of lights the owner of them acquires an absolute and indefeasible right which so far restricts the adjoining owner in the use of his own property that he can do nothing upon his premises which may have the effect of interrupting them" (*Tapling v. Jones*, 11 *House of L. Cas.*, 290; *S. C.*, 34 *Law J. R., N. S., C. P.*, 342). The result is, that under the English Prescription Act twenty years uninterrupted enjoyment of window lights (unless such enjoyment be had under a written agreement), confers an absolute and indefeasible right to them, without regard to the circumstance that the neighboring premises have been, during a part or the whole of that period, in the occupation of a tenant for life or years, or that the owner of the inheritance was ignorant of the user, or that he was not capable of granting an easement so as to bind his successors. The right to window lights may now (as the enjoyment need not now be of right) be gained, not only without the consent, but also without the knowledge of the servient owner. And the decisions show that the right to window lights, when once acquired, is acquired against all the world (*Vide Frewen v. Philips*, 11 *Com. Bench R., N. S.*, 455; *Jones v. Tapling*, 12 *ib.*, 853). But there are certain conditions which must be complied with in order that the enjoyment may be of a character capable of conferring the right. The first of which is that the enjoyment must be had, during the whole period required by the statute, in the character of an easement distinct from the land over which it is had, and on which it is

sought to impose the easement (*Harbridge v. Warwick*, 3 *Excheq. R.*, 552). The second of these conditions is that if it appear that the access of light was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing, then by the terms of the statute, the enjoyment will not be converted into a right after the expiration of the twenty years. The terms of the statute are very plain, and yet in one case at *nisi prius*, in which the access of light had been enjoyed for more than twenty years, under a permission verbally given by the person having the right to obstruct it, and rent had been paid in acknowledgment of that permission, it was argued that no easement was acquired; but the court overruled the objection (*Mayor of London v. The Pewterers' Company*, 2 *Mood. & Rob. R.*, 409).

The third condition referred to is, that the access of light shall have been actually enjoyed for the full period of twenty years without interruption. The interruption which will prevent the maturing of the right under the statute, must be an obstruction by the act of some other person than the claimant, not a cessation by him of his own accord. It was argued in one case that the payment of rent under a parol agreement for the user of lights was such an interruption of the enjoyment as to defeat the acquisition of a prescriptive right under the act. But the Court of Exchequer Chamber decided against the position (*Plasterers' Company v. The Parish Clerks' Company*, 6 *Excheq. R.*, 635; and *vide Gale v. Abbott*, 8 *Jur., N. S.*, 987; *Bennison v. Curtright*, 33 *Law J. R., N. S.*, 2 B., 137). And it has been held by the House of Lords, that a statutory title to the right to window lights may be gained by enjoyment for nineteen years and a portion of a year followed by an interruption for the remaining portion of the last year (*Flight v. Thomas*, 11 *Adolph. & Ell., R.*, 688; *S. C.*, 8 *Clark & Finnelly's R.*, 231).

The last condition is, that the prescribed number of years during which the easement was enjoyed were the years next before the action is brought. This is required by the terms of the statute in order that the right may be acquired. It has been held that the twenty years' enjoyment before *any* suit or action in which the plaintiff's claim to light and air is brought in question is sufficient to confer the statutory right, and not of necessity twenty years' enjoyment before the suit or action then in progress (*Cooper v. Hubbuck*, 12 *Com. Bench R., N. S.*, 470). But

to support a claim to the statutory right, enjoyment during the whole period prescribed by the statute must be proved; and it has been held not allowable for a jury to infer enjoyment for the whole period from proof by the claimant of enjoyment for a part of the period (*Bailey v. Appleyard*, 8 *Adolph. & Ell. R.*, 161, note at page 778).

The words in the statute, "any local usage or custom to the contrary notwithstanding," doubtless refer especially to the custom of the city of London prior to the passage of the act, according to which, the owner of any house within the city was entitled to raise it or to build on its site any height he pleased, notwithstanding that by so doing he might obstruct his neighbor's ancient lights. This custom had been recognized and allowed to govern the question of light and air in the city of London from a very early period (*Vide Hughes v. Keene, Yelverton's R.*, 215). At the time of the decision of *Hughes v. Keene*, which was about the time of the reign of Queen Elizabeth, the custom of London appears to have been almost identical with the common law. By the custom of London, at that period, the existence of a building prevented the imposition by prescription of any obligation on the owner of that building to refrain from interfering with the enjoyment of window lights by his neighbor. In one case before the King's Bench, the recorder of London appeared, and certified *ore tenus* that there was an ancient custom in the city of London, that a person might increase the height of his *house*, or build upon its ancient foundations, though he thereby obstructed his neighbor's ancient lights, but that custom did not extend to any *erection or building* (*Plummer v. Bentham*, 1 *Burrow's R.*, 248). The custom was held to be confined to cases where all the face walls of the old foundations belonged to the person claiming the benefit of the custom (*Shadwell v. Hutchinson*, 3 *Car. & Payne's R.*, 615). The custom remained until it was swept away by the statute, and now the city of London seems to be on the same footing, as respects the right to window lights as other cities in the Kingdom (*Vide The Salter's Company v. Jay*, 3 *Queen's Bench R.*, 109; *Truscott v. The Merchant Taylors' Company*, 11 *Excheq. R.*, 855; *Yates v. Jack*, 1 *Law R., Ch.* 295; *S. C.*, 35 *Law J. R., N. S., Ch.* 539; *Dent v. The Auction Mart Company*, 2 *L. R. Eq.*, 238; *S. C.*, 35 *Law R., N. S., Ch.* 555).

The second method by which the right to window lights may

be acquired, according to the division indicated, is by express agreement, and the authorities upon this point are applicable, both in England and in the American States. It has been before observed that the right to window lights is an easement, and it is pertinent to remark here that an easement, like other corporeal hereditaments, can be created only by an instrument under seal, or, in other words, by a grant. This doctrine is supported by a long series of authorities, a few only of which need be cited (*Bradley v. Gill*, 1 *Lutwyche's R.*, 69; *Fentiman v. Smith*, 4 *East's R.*, 107; *Rex v. Inhabitants of Hordon-on-the-Hill*, 4 *Maule & Selw. R.*, 562; *Bryan v. Whitlee*, 8 *Barn. & Cres. R.*, 288; *S. C.*, 2 *Man. & Ry. R.*, 318; *Cocker v. Cowper*, 1 *Crompt., Mees. & Ros. R.*, 418; *Hewlins v. Shippam*, 5 *Barn. & Cress. R.*, 221; *S. C.*, 7 *Dowling & Ryland's R.*, 783; *Wood v. Leadbetter*, 13 *Mees. & Welsb. R.*, 838.) The courts of the State of New York have held that an easement is an interest in land, within the Revised Statutes of the State, and cannot be created without a conveyance in writing (*Houghtailing v. Houghtailing* 5 *Barb. R.*, 379), or, in some of the cases, it is declared that an easement is a permanent interest or privilege in the land of another, and must be founded upon grant, or upon prescription, which presupposes a grant (*Mumford v. Whitney*, 15 *Wend. R.*, 380; *Brundage v. Warner*, 2 *Hill's R.*, 145; *Boyer v. Brown*, 7 *Barb. R.*, 80). This is the general rule in respect to easements, and an uninterrupted enjoyment of an easement for twenty years, is presumptive evidence of a grant of it (*Irvin v. Fowler*, 5 *Rob. R.*, 482; *Flora v. Carbeau*, 38 *N. Y. R.*, 111). But it will appear hereafter that the doctrine of the prescriptive right to window lights is not fully recognized by the courts of the State of New York, although the rule that the right to window lights, by express agreement, must be by deed, is universal in its application, perhaps.

The English courts, however, have held that, although at law an easement cannot be created without a deed under seal, yet, when persons have, either by express covenant, or by their tacit acquiescence in the creation of such a right, induced others to incur expense, such persons will be restrained by a court of equity from afterward depriving them of the benefit of their expenditure by insisting on the want of a legal title. And this doctrine has been applied in cases of window lights (*Davies v. Marshall*, 1

Drury & Smale's R., 557; *Cotching v. Bassett*, 32 *Beav. R.*, 101; *S. C.*, 32 *Law J. R.*, *N. S.*, *Ch.* 286). In the case of window lights, however, it is probable that mere tacit acquiescence would not bind the owner of the adjoining premises, any more in England than in the American States. The general rule, then, is that in the acquisition of window lights by agreement at law, the right must be created by deed, and the deed must be in the form of a grant, in order that the obligation may be binding at law upon all future owners of the servient tenement. It must be borne in mind, however, that it is not necessary to use any particular form of words in order to constitute a grant. A deed, which is in form a covenant, may operate as a grant. This will be the case where, upon the instrument, an intention appears to confer a right which will affect the land of the covenantor, and the right intended to be conferred is one capable of being made the subject of a grant, as an easement. The legal rule is that the burden of a covenant does not, except in cases between landlord and tenant, run with the land, and hence the necessity of a grant in case of window lights. But no particular form of words is necessary to effect the the grant; any words which clearly show the intention to give the right are sufficient to effect that purpose (*Rowbotham v. Wilson*, 8 *House of L. Cas.* 348). Upon this principle, it would seem that from a covenant by the owner of the adjoining land, that he would not in any way obstruct the access of light and air to the windows of his neighbors's tenement, would be implied a grant from him to his neighbor of the right to window lights over his land, and it may be remarked that in practice express grants of the right to window lights are not often met with. Express covenants to refrain from interfering with a neighbor's enjoyment of light and air are also very rare. Their place has been supplied by covenants by a man to refrain from using his own land in such a way as to interfere with the free access of light and air, and such covenants are sufficient as a grant of the right.

The third and last method by which the right to window lights may be acquired, according to the division indicated, is by implied agreement, and this important mode of acquisition of the right falls into two divisions, in the first of which there is an implied grant of the right to window lights, arising from the principle that a man cannot derogate from his grant, and in the second there is an implied grant of the right arising from the presumed intention

of the person who was the owner of two tenements, one of which enjoyed the right of window lights over the other, previously to their severance. This is the doctrine prevalent in Great Britain. How far it is recognized in the American States will appear by a consideration of the authorities in a subsequent chapter.

The English decisions are very numerous and elaborate upon this branch of the subject, but a brief reference to them only will be necessary in order to understand the law as administered in that kingdom. And first, as to the cases in which it is held that the implied grant arises from the principle that a grantor cannot derogate from his grant. The oldest case found in the reports upon this point, was one in which it appeared that A having built a house let it to B, and the rest of the ground to C; that C obstructed the lights of the house, and B brought an action against him for so doing. The court held that C claiming the land from the builder of the house, could not obstruct the lights of the house any more than the builder himself could, and that the builder could not derogate from his own grant, for the lights were a necessary and essential part of the house. But it was held that had the land been sold before the house, and the house afterward, the vendee of the land might stop the lights, although the court was not unanimous on this point. The result was that the action was sustained (*Palmer v. Fletcher*, 1 *Siderfin's R.*, 167; *S. C.*, 1 *Levinz' R.*, 122). In a later case before the same court, the doctrine of the case of *Palmer v. Fletcher* was assented to, that the grantor or one claiming under him, cannot obstruct the access of light to the house sold; though, as the defendant in the case was a stranger, it was held that the principle did not apply (*Bowery v. Pope*, 1 *Leonard's R.*, 168, and *vide Cox v. Pryor*, 1 *Vent. R.*, 237, 239).

About the year 1700, Holt, Ch. J., said in a case before the English Court of King's Bench: "If a man have a vacant piece of ground and build thereon, and that house has very good lights, and he lets this house to another; and after he builds upon a contiguous piece of ground, or lets the ground contiguous to another, who builds thereupon to the annoyance of the lights of the first house, the lessee of the first house shall have an action upon this case against such builder, etc., for the first house was granted to him with all the easements and delights then belonging to it" (*Rosewell v. Pryor*, 6 *Modern R.*, 116). And again it was said by the Court of Queen's Bench: "If a man build next to a

vacant piece of ground of his own, and then sell the new house, keeping the ground in his own hands, he cannot build upon the waste ground so as to stop the lights of the house; for by sale of the house, all the lights and all necessities to make them useful pass; for by the sale of the house, all the conveniences it has will pass; and as he himself cannot build to the prejudice of the new house sold, so cannot the lessee of the vacant ground do it; but if, in that case, he had sold the vacant ground without reserving the benefit of the lights, the court doubted in that case that the vendee might build so as to stop the lights of his vendor, because he parted with the ground without reserving the benefit of the lights" (*Tenant v. Goldwin*, 6 *Mod. R.*, 314). And subsequently the result of the cases was stated: "That no man can derogate from his own grant; therefore, if I have a house with certain lights in it and land adjoining, and I sell the house but keep the land, neither I nor any one claiming under me, can obstruct the lights by building on the land; for by selling the house I sell the easement in the land also. So, semble, if I sell the land and keep the house, my vendor cannot obstruct the light by building on the land" (*Pomfret v. Ricroft*, 1 *Wms'. Saund. R.*, 323, note *b*). Although these are very old cases, the later authorities are in accord with them. Within the last fifteen years, in a case in the High Court of Chancery of England, in which the plaintiff had taken premises in which to carry on his trade as a diamond merchant, Stuart, Vice-chancellor, said: "There appears to be no sound principle on which, when the demise of the house is to a person known to sustain such a character as that any diminution of the lights would disturb his enjoyment in that character, the reversioner can be allowed to withdraw or obstruct anything necessary to his enjoyment of the demised property in that character" (*Herz v. The Union Bank of London*, 2 *Gifford's R.*, 686, and *vide Jacomb v. Knight*, 32 *Law. J. R.*, *N. S.*, Ch. 601).

In a word, the authorities clearly settle the proposition, that where the owner of two properties, one of which has enjoyed a continuous and apparent right to window lights over the other, disposes of the window property which has enjoyed that right, there is an implied grant by him of the right to the window lights which has been enjoyed therewith. So that if he parts with a tenement which has enjoyed the right to window lights over another part of his property, he, and consequently those claiming

under him, are bound by an implied grant of the right, and are debarred from in any way using the part of the property retained so as to interfere with that right. And it would seem from the authorities that this implied grant results from the general principle that a grantor cannot derogate from his grant. This doctrine is well settled by the law of England, and it appears to be reasonable in any country; certainly as between the grantor and grantee personally, and others having actual notice of the order of transfer, and the situation of the property at the time of the first grant. The principle is considered also to apply where the owner of the two properties parts with them at the same time, or at times so near as to be virtually the same. Said Tindal, Ch. J., in delivering judgment in a case in the English Court of Common Bench: "It is well established by the decided cases, that where the same person possesses a house having the actual use and enjoyment of certain lights, and also possesses the adjoining land, and sells the house to another person; although the lights be new, he cannot, nor can any one who claims under him, build upon the adjoining land so as to obstruct or interrupt the enjoyment of those lights. And in the present case, the sales to the plaintiff and defendant being sales by the same vendor, and taking place at one and the same time, we think the rights of the parties are brought within the application of this general rule" (*Swanborough v. Coventry*, 9 Bing. R., 305; S. C., 2 Moore & Scott's R., 362; and vide *Compton v. Richards*, 1 Price's R., 27). But, to come within the principle of the cases, the right to the window lights must, at the time of the disposition of the property, be continuous and apparent. It has been held, where at the time of the sale of the two tenements there were openings "wholly of an uncertain character, which would have been equally appropriate for a door, a window, or any other purpose to which such an opening might possibly be applied," no easement can arise in respect thereof (*Glave v. Harding*, 27 Law J. R., N. S. Ex., 286; and vide *Riviere v. Bower*, 1 Ryan & Moody's R., 24; *White v. Bass*, 7 Hurlstone & Norman's R., 722; *Pyer v. Carter*, 1 ib., 916; S. C., 26 Law J. R., N. S. Ex., 258; *Suffield v. Brown*, 33 Law J. R., N. S., Ch. 249). It seems that if a person having a house on his land, the windows of which have existed for more than twenty years, even sells a portion of the land, without reservation, the purchaser may erect any buildings he pleases upon the land so

sold to him, however much they may interfere with the lights of the vendor's house. This has been declared to be the law, although it was admitted that the law, if carried to an extreme, would in some cases produce great and startling injustice (*Curriers' Company v. Corbett*, 2 *Drewry & Smale's R.*, 355; and *vide Richards v. Rose*, 9 *Exch. R.*, 218; *Murchir v. Black*, 11 *Jur. N. S.*, 608).

The other branch of cases in which the right to window lights arises by implied grant under the English law, is that in which the owner of two tenements, one of which enjoys the right over the other, disposes of them simultaneously without any valuable consideration to two different persons, either by his will or by a voluntary conveyance. In this case the dominant tenement will retain its easement, or rather a similar easement will be created *de novo* in its favor, provided that such easement be continuous and apparent; that is to say, which is apparent upon a careful inspection by a person ordinarily conversant with such matters. The doctrine of a grantor not being able to derogate from his grant does not affect these cases, as here all that the donee takes is from the free bounty of the donor, and this bounty is to be measured by his intentions either expressed or presumed in the absence of expression. The rule involved in this branch of the subject cannot be illustrated by cases where the exact right to window lights was in question, because but few such cases seem to have been before the courts. But the doctrine is well sustained upon general principles relating to easements, and the authorities upon that subject indirectly settle the soundness of the position taken in this point (*Vide Palden v. Bastard*, 4 *Best & Smith's R.*, 258; *Pearson v. Spencer*, 1 *ib.*, 571; *Latham on Window Lights*, 71-74).

CHAPTER XLVI.

RULES RESPECTING THE RIGHT TO WINDOW LIGHTS IN THE AMERICAN STATES — DECISIONS OF THE COURTS OF NEW YORK AND MASSACHUSETTS UPON THE SUBJECT OF LIGHT AND AIR.

THE doctrine of the English common law upon the subject of light and air has never been fully recognized in the American States, although many of the principles upon which the subject is

treated in England, are adopted to the fullest extent in this country, while upon other points settled by the English law, the courts of this country are by no means harmonious. When window lights come in the category of *ancient lights*, it seems to be quite uniformly held that they cannot be legally interrupted. Indeed, it has been frequently affirmed by the American judges, that the rule that an action upon the case lies for stopping the *ancient lights* of another is too well settled to require discussion or authority to support it. What shall be regarded an *ancient light* has been an unsettled question, although the authorities at present are quite uniform in holding that a party may acquire the right to the free access of light to his house, by the enjoyment of that right for the same time in which an uninterrupted occupation of the house itself would ripen into an absolute title to the house; that is to say, in such a case, the window lights enjoyed might be regarded as ancient. Again it has been unqualifiedly affirmed by eminent American jurists, that every proprietor of land has a natural right to so much light as falls *perpendicularly* upon his own soil, and no more. His rights in this respect would be defined by the legal maxim, *cujus est solum, ejus est usque ad cælum*. Upon this principle, whatever right such proprietor may have to receive light laterally over the land of others is, of course, an easement or something equivalent to an easement; and the same judges who have asserted this principle, have also laid it down in general terms, that the right to the access of light and air over the adjacent lands, may be acquired by covenant or by prescription if not by grant, and which, however acquired, extends beyond the limits of one's own land, and rests, as a burden or restriction, upon the rights of the adjoining proprietor. And it is assumed to be abundantly settled that it is only where an owner has acquired such an easement in his neighbor's land that he can have any protection from the law for his windows, whatever that neighbor may do upon his own land. But the doctrine of the American authorities upon the subject, can be best extracted after a careful consideration of the cases themselves. It is proposed, therefore, to examine all of the leading cases which have been decided by the courts involving the right to window lights, and thereby be enabled to give the exact state of the law upon the subject in the different States.

In a case before the Supreme Court of the State of New York

in 1835, the subject of light and air was incidentally discussed, and Cowen, J., who delivered the opinion of the court, observed : "Every person is entitled to the use of the elements in their natural purity, and whoever poisons them or renders them unhealthy, violates that right. The person who makes a window in his house which overlooks the privacy of his neighbor, does an act which strictly he has no right to do ; although it is said no action lies for it. He is, therefore, encroaching, though not strictly and legally trespassing, upon the rights of another. He enjoys an easement, therefore, in his neighbor's property, which in time may ripen into a right. But before sufficient time has elapsed to raise a presumption of a grant, he has no right, and can maintain no action for being deprived of that easement, let the motive of the deprivation be what it may ; and the reason is, that in the eye of the law he is not injured. He is deprived of no right, but only *prevented from acquiring a right*, without consideration, in his neighbor's property" (*Mahon v. Brown*, 13 Wend. R., 261, 264, 265). But the same court, three years later, held, in a case involving the precise question, that the doctrine of *presumption of right* by grant or otherwise as applied to the *windows of one person overlooking the land of another*, so that by an uninterrupted enjoyment for twenty years the owner acquires a right of action against his neighbor for *stopping the lights* by the erection of a building upon his own land, forms no part of our law ; and it was declared that such a rule is not adapted to the circumstances or existing state of things in this country. The case was decided in 1838, and Bronson, J., in delivering the opinion of the court, went into a learned and elaborate review of the authorities upon the subject, and declared that as neither light, air nor prospect can be the subject of a *grant*, the proper presumption, if any, to be made in such a case is, that there was some *covenant or agreement* not to obstruct the lights, but on the whole he was of the opinion that the modern English doctrine upon the subject of lights could not be supported upon any principle which can be applied here, though it might do well enough in England. The learned judge thought the doctrine could not be applied in the growing cities and villages of this country, without working the most mischievous consequences, and in this opinion, Nelson, Ch. J., concurred, while Cowen, J., dissented (*Parker v. Foote*, 19 Wend. R., 309). According to this decision the enjoyment of

light and air, is not regarded as adverse or hostile to any right of the owner of the adjoining land, and cannot, therefore, become the foundation of a presumption of right to continue their use as against such owner. This is the doctrine of the opinion of Judge Bronson, at least, in which the Chief Justice concurred, although the *decision* was, that there should be a new trial in the case, which had really been directed on another point, and the Chief Justice, a few years before, in the case of *Mahon v. Brown*, esteemed the contrary to be too well settled to require discussion, yet not deciding the point. The doctrine of the case upon this point, however, has been often referred to incidentally by judges in subsequent cases, sometimes with entire approval, and at others with more doubtful expression. In a case decided by the Court of Appeals in 1854, not involving the precise point, however, Selden, J., said: "In England, after twenty years uninterrupted use of a window, a right to its enjoyment is presumed; and this right the law will protect. But the rule is otherwise in this State;" and refers to *Parker v. Foote*, for authority (*Auburn and Cato Plank Road Company v. Douglas*, 9 *N. Y. R.*, 444, 447). But six years later, Clerke, J., in the same court, said: "In *Parker v. Foote* (19 *Wend.*, 309), which was an action for stopping lights in a dwelling-house, it was held, and clearly upon authority, if the user is wrongful, if it is a usurpation to any extent upon the rights of another, it is of itself adverse, and if acquiesced in for twenty years, a reasonable foundation is laid for presuming a grant" (*Hammond v. Zehner*, 21 *N. Y. R.*, 118, 120). And at the next term of the same high court, Selden, J., used this language: "It is well settled, that, as a general rule, if the owner of a building has windows overlooking an adjoining lot, the owner of the latter may build directly in front of the windows so as entirely to obstruct their lights, unless they are shown to be *ancient*. If, however, both proprietors obtained their title from a common source, the same grantor having conveyed the tenement with the windows to one, and the ground overlooked to another, the windows cannot be obstructed; and the reason is, that the relative qualities of the two tenements must be considered as fixed at the time of their severance, each retains, as between it and the other, the proportion then visibly attached to it, and neither party has a right afterward to change them" (*Lampman v. Milks*, 21 *N. Y. R.*, 505, 511). This is in entire harmony

with the rule of the common law, that where the owner of two tenements sells one of them, or the owner of an entire estate sells a portion, the purchaser takes the tenement, or portion sold, with all the benefits and burdens which appear, at the time of the sale, to belong to it, as between it and the property which the vendor retains. This is one of the recognized modes by which an easement or servitude is created, and the principle is held by Judge Selden to apply in the case of window lights.

In 1868 a case came before the Court of Appeals of the State of New York, which involved the effect of a covenant of the owner of adjacent premises with the neighboring owner, not to erect, or suffer to be erected, on the premises, any structure or building of any kind, whereby the view or prospect of the bay, from any part of the dwelling-house of the latter shall be obstructed or impaired in any manner or degree whatever. The court held that this gave the covenantee an easement in the covenantor's land, and in case of its infraction, a court of equity would interpose by injunction, and that too as against the grantee of the covenantor in favor of the grantee of the covenantee (*Gibert v. Peteler*, 38 *N. Y. R.*, 165). When the case was before the Supreme Court, Emott, J., said: "A covenant or agreement restricting the use of any lands or tenements in favor or on account of other lands, creates an easement and makes one tenement, in the language of the civil law, servient and the other dominant; and this without regard to any privity or connection of title or estate in the two parcels, or their owners. All that is necessary is a clear manifestation of the intention of the person who is the source of title, to subject one parcel of land to a restriction in its use for the benefit of another; whether that other belong at the time to himself or to third persons, and sufficient language to make that restriction perpetual" (*Gibert v. Peteler*, 38 *Barb. R.*, 488, 514). This opinion was given at the General Term on which the judgment entered in the case was set aside, and a new trial granted. But on the second trial the judgment was in accordance with the said opinion, which was affirmed by the Court of Appeals; so that the position taken by Judge Emott has a very important bearing upon the question of the right to window lights guaranteed by covenant or agreement.

In 1851, the Supreme Court of the State of New York had the question of the right to window lights directly before it, and by

two of the three judges, the third dissenting, the doctrine was laid down to the effect, that the common law of England, on the subject of light and air, as an easement or incident to real estate, is not the law of this country; and it was declared to be inapplicable to the condition of this country when the State of New York was settled by the colonists, and formed no part of the law of the colony on the 19th of April, 1775. Upon this generally conceded principle, the majority of the court held in the case, where it appeared that the owner of two adjoining lots in the city of New York, upon one of which was a building deriving its light and air over and through an open space in the rear of the other lot, into which the windows of the building opened and looked, leased the building and lot upon which it was erected for a term of years, with its appurtenances, without reserving to himself a right to build on such other lot, or stop, or darken the windows of the building leased, and afterward built a house, covering the whole open space of the other lot, darkening the windows, and excluding the light and air from the building occupied by his tenants; that the landlord might lawfully darken or stop the windows by any erection on the other lot, and that such an act was not in derogation of his own grant, and he could not be restrained by injunction from so doing (*Myers v. Gummel*, 10 *Barb. R.*, 537). The correctness of this decision upon the statement of the case in the report, may well be doubted. It would certainly seem *inequitable* for a party to lease to another a tenement enjoying the right to light and air essential to the comfortable or profitable occupation of the leasehold premises, and then be permitted to deprive his tenant of so important a privilege; and the doctrine is, at least, opposed to the tenor of some of the *dicta* in subsequent cases in the Court of Appeals, as well as of the Supreme Court of the State. The case has never been directly overruled, however, and it does not seem even to have been quoted in any reported case before the New York courts. It was decided upon the authority of *Parker v. Foote* (19 *Wend. R.*, 309), and Mitchell, J., who delivered the opinion of the court, appears to have been very confident that authority as well as principle shows the doctrine of that case to be the law of the State of New York. Edwards, J., concurred in the opinion of Mitchell, while Edmonds, P. J., dissented, so that the *decision* was made by a divided court.

In 1847, the subject of the right to window lights was before Sandford, V. C., in a case pending in the late Court of Chancery of the State of New York. The question was presented on a motion to restore an injunction restraining the defendants from further erecting a building in the city of New York, which would deprive the complainants' adjoining tenement of light and air, claimed by them by prescription and by contract. The defendants' counsel showed to the court, by reference to their answer and a diagram annexed, and also stated, that they had left an open space in their rear, for the complainants' accommodation as well as their own, from which the complainants' tenement might derive light and air, if they would take down a four story privy forming a part of their tenement, and butting against such open space. The injunction having been dissolved, the complainants, on the faith of such statement and representation, took down their privy, and inserted windows in the wall of their tenement, in the place of the doors that led to the privy. The defendants objected, and commenced building a wall across the open space over against such new windows, intended to be carried to the height of such tenement, and which would nearly or quite prevent the access of light and air to the same. The distinguished and learned Vice-chancellor, restrained the erection of such wall by the defendants. It was insisted by the defendants, that according to the established law in the State, no right to light and air can be acquired by lapse of time; that such enjoyment of light and air, cannot be adverse or hostile to any right of the owner of the adjoining land, and cannot become the foundation of a presumption of right to continue their use as against such owner. The Vice-chancellor referred to the authorities upon the point, and regarded it as a question of vast importance, but was persuaded that it was not his duty to decide it upon a mere interlocutory application, and left it in doubt as to what his decision would have been upon the subject, had he considered it (*Banks v. The American Tract Society*, 4 Sand. Ch. R., 438). But two years afterward, a case came before the Superior Court of the city of New York, of which Vice-chancellor Sandford was then a distinguished member, in which it was decided that a landlord who owns land adjoining the demised premises, has a right to build on such land, though he may thereby obstruct and darken the windows in the tenement demised. Oakley, Ch. J., delivered the opinion of the court, and

said: "When there is no question of ancient lights (and there is none in this case), the owner of a lot adjoining a house, may so improve and build upon his lot, as to shut up the windows of such house that are situated in the end or side adjacent to his lot. If this were not so, he would be deprived of the full benefit of his own property. We perceive no reason why a landlord, in respect of his tenant, is more restricted as to his vacant lots, than he would be in respect of any other owner for years, or in fee, of an adjacent house" (*Palmer v. Wetmore*, 2 Sand. R., 316). The action in this case was upon the agreement for the rent, and the defense was, that the evidence of the obstruction to the windows of the tenement devised, established an eviction, and defeated the landlord of his rent. Sandford, J., before whom the action was tried at *nisi prius*, decided that the obstruction of the light was not sufficient to constitute an eviction, and the decision was sustained at the General Term. The decision of the case, therefore, may have been correct, even though the landlord might have been liable, in some form, for obstructing the light of the tenement devised. But the doctrine laid down at General Term was as above indicated, and is in accordance with that which was adopted in the case of *Myers v. Gummel* by a divided court, as reported in 10 Barbour, 537.

In a case before the Supreme Court of the State of New York, which was decided in 1856, it was complained that the defendant erected upon his own premises, immediately adjoining the plaintiff's dwelling-house, and before his windows and doors, a board fence of from eight to ten feet high, and covered it with gas-tar, and permitted it to remain so, to the annoyance of the plaintiff, and rendering the plaintiff's dwelling-house unfit for a habitation. Evidence was given to support the complaint. The court, at *nisi prius*, charged the jury, that the defendant "had not a right to build a fence in an unusual manner, materially to injure and annoy his neighbor, and deprive him of the use and enjoyment of his lot;" and further, "if you find the defendant put this fence there, or covered it with gas-tar," etc., he must be responsible for any damages or injury done thereby." The jury found a verdict in favor of the plaintiff, and the defendant appealed to the General Term, where the doctrine of the instructions relating to the fence was regarded to be to the effect, that the defendant had not a right to build a fence on his own land for the purpose of excluding the

light from the plaintiff's dwelling; and this was held to be error. T. R. Strong, J., delivered the opinion of the court, and, after referring to certain things which are violations of absolute legal rights and are strict legal injuries, said: "But darkening another's windows, or depriving him of a prospect, by building on one's own land, where no right to light unobstructed has been acquired by grant or prescription, * * * invade no legal right, and hence are not legal injuries" (*Pickard v. Collins*, 23 Barb. R., 444, 458). And in 1861, in the same court, Hogeboom, J., in giving the opinion in a case, enumerated various cases in which the maxim *sic utere tuo ut alienum non lœdas* applies, said a man "may not obstruct ancient lights" (*Relyea v. Beaver*, 34 Barb. R., 547, 552).

These are the principal cases found in the New York reports involving the right to window lights, or in which the subject was discussed, from which it is not quite certain how far the modern English doctrine upon the subject may be carried. Clearly, however, the right to *ancient* lights will be sustained, and the right to window lights which may be secured by covenant or grant. And the better opinion seems to be that the right to light may also be acquired by prescription; and that the right will also be sustained, where the proprietors of lands obtain their title from a common source, the same grantor having conveyed the tenement with the windows to one, and the ground overlooked to another.

The tendency of the early judicial decisions of Massachusetts upon the subject of light and air, was nearly or quite in accordance with the principles of the common law, as held in England. In a case before the Supreme Judicial Court in 1815, it was held that in an action against one for stopping the plaintiff's lights, it is not necessary to allege that his house was an ancient one, or that he is entitled by prescription to the easement in question; but, without such allegation, the plaintiff may prove an ancient right to the easement, if it be necessary to his case. And the question was squarely before the court, and it was expressly held, that where one sells a messuage having doors or windows opening into a vacant lot adjoining and belonging to the vendor, without reserving a right to build on such lot, or to stop the doors and windows, neither he nor his grantee of such lot can lawfully stop them. Jackson, J., who delivered the opinion of the court, referred to the English authorities to sustain the position (*Storv*,

v. Odin, 12 *Muss. R.*, 157, 160). About thirty years later, in a case before the same court, a bill in equity was sought to be maintained upon the right acquired by the principles of the common law, by force of which twenty years' adverse use of light and air gives to the possessor an easement of a perpetual character. The counsel for the defendant urged that the later English doctrines upon the subject had not been sanctioned in the commonwealth, and were not adapted to the state of things in this country. Dewey, J., who delivered the opinion of the court, said that the question was an interesting one; and that the view taken of it by the counsel for the defendant seemed to have been sanctioned by the courts of the States of New York and Connecticut, while the tendency of the Massachusetts decisions had been the other way. But for reasons which were stated, the case was disposed of without expressing any opinion in respect to the alleged easement in the light and air claimed (*Atkins v. Chilson*, 7 *Met. R.*, 398, 403).

In 1856, a case came before the Supreme Judicial Court of Massachusetts, which raised the question whether an owner of a city tenement, by having had windows opening toward the land of another, receiving light therefrom for twenty years, without obstruction, acquires an absolute right to the continued enjoyment of that privilege, so that in case a coterminous proprietor erects a wall or building on his own land so as to obstruct such light, the owner of the land having such windows can enter and pull down the wall causing such obstruction. Upon this question, Shaw, Ch. J., who delivered the opinion of the court, thought there had been no direct judicial decision in the commonwealth, but he said: "The general rule of the common law, before it was regulated by statute, seems to have been in favor of the affirmative of the question; holding that uninterrupted enjoyment of air laterally, through and over the land of another, and enjoyed a length of time, created an easement, which could not be disturbed, like that of a right of way, or aqueduct or drain in and over the land of another. * * * In many of the States of the Union, the negative of the question has been judicially held; that the enjoyment of light and air in a messuage or building, received through windows laterally, over the vacant territory or lower building of an adjoining proprietor, gives to the owner of such building no right to the continuance of such enjoyment, and imposes no servitude upon an adjoining estate. * * * We think the rule is

well settled, that, in a city tenement, an easement for light and air, derived from use and enjoyment, or implied grant, can only extend to a reasonable distance, so as to give to the tenement entitled to it such amount of air and light as is reasonably necessary to the comfortable and useful occupation of the tenement for the purposes of habitation or business." The court decided that the windows of the defendant were not substantially deprived of light, and the case turned upon that view (*Fifty Associates v. Tudor*, 6 *Gray's R.*, 255, 259). In this case, it appeared that the wall complained of was erected ten feet from the dividing line, and of course ten feet from the windows obstructed, and, under those circumstances, the court held that the wall was no such legal obstruction of the adverse party's air and light, as to amount to a nuisance, and the decision was put upon that ground. But at a subsequent term of the same court, in the same year, it was held, that where the owner of two adjoining lots of land, on one of which is a building with a window in the wall close to the dividing line between the two, overlooking the other lot, sells them both by auction on the same day, with the privileges and appurtenances belonging to each, the purchaser of the lot on which the building stands acquires no right of light and air over the other lot, though the sale and conveyance to him respectively precede the sale and conveyance of the other lot. Shaw, Ch. J., in delivering the opinion of the court, said: "The present case involves no question respecting the right which the owner of a building may claim for light and air through one or more windows, from and over the land of another, by actual use and enjoyment for a required length of time. The question turns wholly upon the construction of the deed from the Concord Milldam Company to the plaintiff, and that question is whether, by implication, any right to air and light was granted by that deed to the plaintiff;" and under the circumstances of the case detailed by the learned Chief Justice, it was held that the plaintiff did not acquire any such right. The case of *Swansborough v. Coventry* (9 *Bingham*, 305) was referred to and distinguished from the one at bar (*Collier v. Pierce*, 7 *Gray's R.*, 18, 19).

In the year 1852, the General Court of Massachusetts enacted that, "no person, who has erected or may erect any house or other building near the land of any other person, with windows overlooking such land of such other person, shall, by mere con-

tinuance of such windows, acquire any easements of light or air, so as to prevent such other person, and those claiming under him from erecting any building on such land" (*Statutes of 1852, ch. 144*). It has been held, however, by the Supreme Judicial Court of the State, that previous to the enactment of this statute, by the law of Massachusetts, the mere uninterrupted continuance, for more than twenty years, of a window with a projecting sill, overlooking the land of another, did not necessarily create any easement of light or air; and Metcalf, J., who delivered the opinion of the court, referred to the American decisions upon the subject, and concluded: "The strict grounds of the decisions cited are, 1st. That the making of a window in one's building, on his own land, and overlooking the land of his neighbor, is no encroachment on his neighbor's rights, and therefore cannot be regarded as adverse to him; 2d. That the English doctrine is not applicable to the state of things in this country, and would, if applied, work mischievous consequences in our cities and villages" (*Rogers v. Sawin, 10 Gray's R., 376, 379*). The same doctrine was held, in a later case, before the same court, in which it was declared, that no easement of light and air was acquired by their coming laterally for more than twenty years before the statute of 1852, to a window in the wall of a house standing on the boundary line of its owners's estate, although the window swung out on hinges over the adjoining land (*Carrig v. Dee, 14 Gray's R., 583*). And the same principles were subsequently recognized by the same court in a case in which Bigelow, J., delivered the opinion (*Richardson v. Pond, 15 Gray's R., 387*). It seems, therefore, that by the law of Massachusetts, as it now stands, *ancient lights*, and those which are secured by express covenant or grant, only, will be protected by the courts of the State. Several cases have been passed upon, in which a construction has been given to the language of covenants or conveyances relating to light and air, but it is not needful that they be referred to in this place.

CHAPTER XLVII.

RULES RESPECTING THE RIGHT TO WINDOW LIGHTS IN THE AMERICAN STATES — DECISIONS OF THE COURTS IN MAINE, VERMONT AND SOME OTHERS OF THE UNITED STATES UPON THE SUBJECT OF LIGHT AND AIR — DOCTRINE OF THE AUTHORITIES.

THE decisions of the courts upon the subject of air and light are more numerous in the States of New York and Massachusetts than in any of the other States of the Union, although the question has been passed upon by the courts in a majority of the States, and the decisions for the most part are in harmony with those in the cases already considered. In the State of Maine there is a statute which provides that no easement shall be acquired by adverse use, except for twenty years uninterrupted (*R. S., ch. 147, § 14*); and the Supreme Court of the State has held that this statute was not intended to give any rights such as therein specified, or to determine how they might be acquired, but to prevent their acquisition without certain prescribed conditions. Accordingly it was held that, where one erects a building upon his own land immediately adjoining the land of another person, and puts out windows overlooking that neighbor's land, he does nothing more than exercise a legal right; and that a continuance of the use of such windows uninterrupted for twenty years will not give him any additional right so that he can maintain an action against the owner of the adjoining land for obstructing such lights by buildings erected on his own land. But it was declared, that if the person so putting out windows could acquire the right to maintain them unobstructed by use, he could not while he himself was in the possession of the adjoining land as tenant of the owner (*Pierre v. Fernald, 26 Maine R., 436*).

In one case decided by the Supreme Court of Vermont, it was decided, that long continued use of light for the windows of one's building, standing on or near the line of his land, raises no presumption of a grant of the right to such use from the owner of the adjoining land; and that the former can maintain no action against the latter for the obstruction of such light by an erection upon his own premises. The English doctrine of ancient lights was examined by Pierpoint, J., and deemed to be inapplicable in this country; but the opinion was advanced, however, that one.

who has conveyed to another a building with the privileges, etc., has no right to make an erection on his own land which shall shut out the light from the windows of the building so conveyed (*Hubbard v. Town*, 33 *Vt. R.*, 295).

In 1851, the question of the right to light came before the Supreme Court of Pennsylvania, and certain principles were laid down as applicable to the subject in that State. The case was this: Two houses belonging to the same owner being advertised for sale at the same time, one was struck off and the conditions of sale signed, the sale to be clear of incumbrances; the other house, in which were windows overlooking the first property, was sold immediately afterward. The court held that the sales were not simultaneous, and that the house first sold was not subject to the easement of light for the windows in the other. But it was declared that, if the sales *had been simultaneous*, the case would not be different, as the property last sold should have been sold *first* in order to entitle the purchaser of it to the easement. And the rule was laid down, that where two lots of land are passing from a vendor at the same instant, it cannot be *implied* that he is making one servient to the other as to light and air, especially when both are sold clear of incumbrance, for an easement is an incumbrance (*Maynard v. Esher*, 17 *Penn. R.*, 222). And eight years afterward the question, in a different form, came before the same court, when it was declared that in the State of Pennsylvania, the grant of an easement for light and air is not implied from the fact that such a privilege has been long enjoyed. Nor is a contract for such a privilege implied, on the sale of a house and lot, from the character of the improvements on the lot sold and the adjoining lots. And it was observed that the advantage which one man derives by obtaining light and air over the ground of another, is not an adverse privilege; and no implication of a grant being necessary to account for it, none arises from the fact of enjoyment. Lowrie, Ch. J., who delivered the opinion of the court, observed that there could be no possible case in which such an implication could arise, but that the court were satisfied that none was necessary or proper in the case under consideration (*Hauserstick v. Sipe*, 33 *Penn. R.*, 368, 371; *vide King v. Large*, 7 *Philadelphia R.*, 280).

The Court of Appeals of the State of Maryland have held, within the last few years, that the doctrine that if the owner of

two adjoining lots, one vacant, and the other having on it a building, with lights opening over the former, sells the latter without reserving a right to build on the vacant lot or stop such lights, then he cannot afterward obstruct them, does not apply where there being several owners to each lot, some but not all of them are part owners of both lots. And it was declared, that the modern English doctrine of the acquisition of a right to open and unobstructed use of lights by an adverse use of them for twenty years is not adopted in Maryland. A distinction was made between this and some other kinds of easements; for it was held in the same case, that the owner of land, the eaves of whose house extend over the adjoining lot without objection for twenty years, acquires an easement in such lot. Although the rule was not expressly held applicable in the State, that an owner owning two adjoining lots, on one of which is a house with windows opening over the other which is vacant, sells the latter without reservation, will not be permitted to build upon the lot retained in such a manner as to seriously obstruct the lights of the house sold, yet the doctrine was impliedly sanctioned by the court (*Cherry v. Stein*, 11 *Md. R.*, 1).

The Supreme Court of West Virginia has recently considered the question of the right to window lights, in a case in which it appeared that one Dorsey was in the occupation of property with windows, constructed in 1803, and one Cunningham was the owner of the adjoining property, which had been occupied from 1803, by himself and those from whom he derived title to 1826, and thence till 1866, by his tenants, when an application was made by Dorsey for an injunction to restrain the tenants of Cunningham from the erection of buildings upon the premises of Cunningham which should darken the windows of Dorsey. The court held that Dorsey was not entitled to the injunction (*Cunningham v. Dorsey*, 4 *W. Va. R.*, 293).

The Supreme Court of Ohio has recently held that no *prescriptive* right to the use of light and air through windows can be acquired by any length of user and enjoyment (*Muller v. Stricker*, 19 *Ohio R.*, 135). But the courts of South Carolina held in one case, that an action lies against the owner of the adjoining soil for obstructing the lights of a party, of which he had had the uninterrupted enjoyment for more than twenty years (*McCready v. Thomson*, *Dudley's R.*, 131). A doubt, however, seems to be

thrown over the doctrine of this case, by a later decision, where it appeared that the plaintiff's house being highest, his windows, for more than twenty years, overlooked the defendant's house; the defendant built a taller house and closed the plaintiff's windows, and the plaintiff brought suit for the obstruction. The court held, that the enjoyment of an easement must be adverse to raise the presumption of a grant; that such enjoyment must constitute a legal injury for which an action would lie; that the receiving of light coming over defendant's house into plaintiff's windows did not amount to such legal injury; and of course did not raise the presumption of a grant. In the course of the opinion of the court, it is observed: "The same distinctions would prevent the acquisition of an easement in the shade of a tree which stands on his neighbor's land near his boundary, or of an easement to have continued the protection against winds which a neighbor's forest, or a hill on his land, had long added to another's orchard" *Napier v. Bulwinkle*, 5 Rich. R., 311).

In an action before the Supreme Court of Alabama some fourteen years ago, it was held that an averment that the plaintiff owned a dwelling-house, in which there were, and still of right ought to be, five ancient windows, through which the light and air ought to have entered, and still ought to enter of right, allows proof of a prescriptive right, of one founded on grant, or on adverse user. But the question was left in doubt, whether or not adverse user during the period limited for real actions, conclusively settles the right to the unobstructed use of ancient windows (*Ward v. Neal*, 35 Ala. R., 602). But some three or four years later, the same court held, that the English doctrine that an action for obstructing ancient lights can be sustained upon mere uninterrupted user of the easement for a period which would bar a recovery in ejectment against a trespasser, has not been adopted in Alabama, and it was declared that the doctrine had not been adopted in this country generally (*Ward v. Neal*, 1 Ala. Select Cases, 413). And finally the same court has expressly laid down the rule as adopted in that State, that an easement of light cannot be acquired by prescription (*Ward v. Neal*, 37 Ala. R., 500).

In the State of Louisiana they have a statute regulating the servitudes of light and view; and the Supreme Court of the State has held, that the erection of a verandah of the same width with the street, in front of one's house, is not an infringement of the

rights of the owner of the adjoining tenement, and cannot be complained of as a violation of the articles of the civil code upon that subject (*Durant v. Riddell*, 12 *La. An. R.*, 746). But the same court has more recently held that, where the owner of the lots on both sides of a division wall makes an opening or window in the wall, it is an act constituting the “*destination du père de famille*,” and is equivalent to a title creating a servitude, as soon as a division of the ownership of the property takes place. And it was further held, that the erection of works contrary to the servitude would not have the effect of extinguishing it, unless the owner of the estate to which the servitude was due had given an express permission or consent to the erection of such works either verbally or in writing (*Lavillebeuve v. Cosgrove*, 13 *La. An. R.*, 323). And the same court has since held, that the servitude of light and sight is continuous and apparent, and may be imposed by the owner of two lots, on one in favor of the other (*Cleris v. Tieman*, 15 *La. An. R.*, 316). This doctrine may be sustained without the aid of any statutory enactment, provided the servitude is declared in the conveyance of the lot first granted. The Supreme Court of Texas has recently held, that by the common law a prescriptive right to prevent the adjacent proprietor from inclosing or building upon his own land cannot be acquired by the use of a house having windows looking out upon his land, and receiving light and air from that direction for a period of ten years. The doctrine of the common law upon the subject, was not *expressly* sanctioned by the court, although it may be *inferred* from the opinion in the case that the doctrine was approved (*Klein v. Gehrung*, 25 *Tex. R.*, 332).

The question of the right to window lights has not, as yet, been much considered by the courts of the western and newly-settled States of the Union; although a case has lately been before the Supreme Court of the State of Iowa, in which the subject was elaborately examined, and the conclusion was reached by Dillon, Ch. J., who delivered the opinion, that the English doctrine that there may be a grant of light and air *by implication* is not applicable to the situation and condition of this country. The English rule was declared to be this: If a man sells a house with windows and doors opening on to his vacant ground, neither he nor his grantee can afterward build upon such vacant ground so as to obstruct the flow of light and air without *express reservation* of

the right to do so ; and the court held, that if such a rule should be recognized in this country, it should be applied only in cases where the circumstances make it clear that such must have been the intention of the parties. It was, however, declared by the Chief Justice, that it is settled law that there is no *implied reservation* of a right to light and air ; so that if one sells vacant land and retains the house adjoining, the purchaser of the vacant land may build thereon, though he darken thereby the windows of the house of the vendor. These positions were examined in the light of the authorities both English and American, although they were not necessarily settled by the judgment of the court, for the reason that the peculiar facts of the case might well conduce to the conclusion arrived at independent of the considerations in respect to the common-law doctrine discussed. Indeed, it was expressly declared that, the nature of the conveyances to the plaintiffs ; the character of the buildings showing them not to be essentially dependent on the rear windows for light ; the nature and effect of previous alienations of adjacent property by the common vendor ; the express provision of a four-feet right of way in the rear of the plaintiff's tenements, were held to be circumstances sufficient to negative any implied easement of light and air over adjacent land retained by the vendor of the plaintiffs. The real doctrine of the case would seem to be, that there was no implied grant of an easement of light and air for the rear windows of a building, where the building was not essentially dependent on such windows for light when conveyed, and where several easements, but not this one, were expressly created by the conveyance, and where there was an express grant of a four-feet right of way at the rear of the building, separating the land claimed to be subject to the easement from the alleged dominant tenement. This is really all that was settled by the case, although the Chief Justice declared the rule not a sound one that permits, under any circumstances, an easement of light and air to be burdened, by implication, upon an adjoining estate so as to prevent the owner of such estate from building on or improving it as he pleases. The opinion of the court opens by affirming that the main principles involved in the case had never been judicially settled in the State, and that the adjudications elsewhere upon the same or similar questions were not uniform. American authorities were cited, both as sustaining the doctrine, that a vendor of a house cannot after-

ward, on his adjoining vacant land, make an erection which shall deprive such house of light, and as opposed to the doctrine, with a decided preponderance in favor of the former, and finally, it is observed: "Without positively deciding that there may not, under any circumstances, be an implied easement of light and air, we hold that the circumstances before enumerated negative any such implication or easement in the case under consideration" (*Morrison v. Marquardt*, 24 Iowa R., 35).

The doctrine of the American courts upon the subject of the right to light and air must be gathered from the cases considered in this and the preceding chapter. It will be observed that these cases are not entirely harmonious upon the question, and the judgment in several of them was rendered by a divided court; and yet, the general drift of opinion is quite apparent and reliable. In the last case cited, the only branch of the subject discussed was, whether it is a principle of American law, that if a man sells a house with windows and doors opening on to his vacant ground, he nor his grantee cannot afterward build upon such vacant ground in such a manner as seriously to obstruct the flow of light and air to such house, without *express reservation* of the right to do so; and the Chief Justice, who delivered the opinion of the court, holds in the negative, while the better opinion, perhaps, where the subject is unaffected by statute, would justify an answer in the affirmative. Most of the other cases considered, involve, severally, a single branch of the subject, although in some of them the entire English common law upon the question is examined.

Judge Washburn, in his treatise on Easements and Servitudes, devotes a few pages upon the subject of light and air, and after examining the English authorities, says: "The subject has thus far been treated of chiefly from the point of view of the English common law, with a brief allusion to English local statutes. This has been done in order to present, in something like a connected order, the rules which prevail in the American States upon the subject of acquiring rights to light and air by mere length of enjoyment. These will generally be found to be at variance with the English law. And even as to the effect to be given to grants, in respect to the enjoyment of light and air, arising from the condition and circumstances of the estates to which they relate, the decisions will be found to be far from uniform, and some of them not very satisfactory.

"The reason generally assigned for adopting a different rule in this country, as to presumptive rights to light and air, from that which prevails in England is, that the latter is not suited to the condition of a country which is growing and changing so rapidly in all its relations of property, as well as its value and modes of enjoyment. * * *.

"It will be found it is believed, that in New York, Massachusetts, South Carolina, Maine, Maryland, Pennsylvania, Alabama and Connecticut, the doctrine of gaining a prescriptive right to light and air, by mere length of enjoyment has been discarded; while the English rule in this respect is retained in Illinois, New Jersey and Louisiana" (*Washburn on Ease. and Serv.*, 2d ed., 582, 583).

In respect to the doctrine of the right to window lights by *implication*, the learned author says: "So far, therefore, as weight of authority both English and American goes, it would seem that, if one sells a house, the light *necessary* for the reasonable enjoyment whereof is derived from and across adjoining land, then belonging to the same owner, the easement of light and air over such vacant lot would pass as incident to the dwelling-house, *because necessary to the enjoyment thereof*; but that the law would not carry the doctrine to the securing of such easement as a mere convenience to the granted premises" (*Washb. on Ease. and Serv.*, 590). And Judge Story recognized this doctrine to the fullest extent. While presiding in the Circuit Court of the United States for the first circuit, he had a case before him, in which he says: "There can be no doubt that the grant carries with it the right to the enjoyment of the light of those windows, and that the grantor cannot by building on his adjacent lot entitle himself to obstruct the light or close up the windows. * * * Their grant carried, by necessary implication, a right to the door and windows, and the passage as it had been, and as it then was used" (*United States v. Appleton*, 1 *Sumner's R.*, 492, 502).

Upon this subject, Chancellor Kent says: "This doctrine of ancient lights, or, in the language of the writers on the civil law, borrowed from the law itself, of 'servitudes of lights or prospect' attached to estates, is laid down with great precision in the Pandects, and in the codes of those modern nations which have made the civil law the basis of their municipal law; and it is evidence of much civilization and refinement in the modifications of

property. But the doctrine is not much relished in this country, owing to the rapid changes and improvements in our cities and villages." And in confirmation of this last remark of the learned commentator, he refers to the case of *Parker v. Foote* (19 *Wend. R.*, 309), which goes so far as to declare that the modern English doctrine, on the subject of lights, was an anomaly in the law, and not applicable to the condition of the cities and villages in this country, and in respect to the case, observes: "Though this incorporeal servitude of light is familiar to the laws of all civilized nations, and is, under due regulations, a very valuable incident to the enjoyment of property, there does not seem to be any well founded objection to the decision in the case last referred to, so far as it goes to declare that the enjoyment of the easement must be uninterrupted for the period of twenty years, and under a claim or assertion of right, and with the knowledge and acquiescence of the owner; and that the presumption of right, under these circumstances, is not an absolute bar, and conclusive, but may be explained and repelled, and is only a matter of evidence for a jury to infer the right" (3 *Kent's Com.*, 7th ed., 549, 550).

In view of the authorities, it may be predicted, that, as the country grows older and more populous, the modern doctrine of the English common law, upon the subject of window lights, will be gradually adopted in this country. According to the present state of the law here, it may be affirmed, that, where there is no statute to qualify the doctrine, the better opinion is, that the English rule in respect to *ancient* lights, and the acquiring the right to light and air by grant or covenant, and by implication in certain cases, and by prescription, are more generally recognized in the American States, and the doctrine in these respects is in harmony with equity and fair dealing.

CHAPTER XLVIII.

THE EXTENT OF THE RIGHT TO WINDOW LIGHTS — THE GENERAL RULE UPON THE SUBJECT — HOW THE RIGHT MAY BE LOST — THE RIGHT UNDER SPECIAL COVENANTS.

AFTER the right to the enjoyment of light and air is established in a given case, it next becomes important to consider the extent to which the right may be maintained. In respect to this, the rule settled by the authorities seems to be, that the owner of the servient tenement will not be permitted to make any such use of his property as shall cause a sensible diminution of the value of the dominant tenement by the obstruction of the access to it of light and air, to such a degree as to interfere with the comfort of the dwellers in the house in the ordinary occupations of life, or with the beneficial use of the premises for the purposes of business. This is substantially the rule as laid down in the English courts, at an early day, and repeated quite recently by Vice-chancellor Wood in the English Court of Chancery, in a case in which he said: "First of all, it is necessary to ascertain what it is that will at law support a claim for damages in respect of an injury done to a building by the obstruction of light and air; and the authority to which I would refer, in preference to any other, upon this subject, is the summing up of Chief Justice Best in the case of *Back v. Stacey*, because that summing up has been approved of by the Lord Justices in a recent case before their Lordships. The Chief Justice told the jury, 'in order to give a right of action, and sustain the issue, there must be a substantial privation of light sufficient to render the occupation of the house uncomfortable, and to prevent the plaintiff from carrying on his accustomed business as beneficially as he had formerly done.' With the single exception of reading *or* for *and*, I apprehend that the above statement correctly lays down the doctrine in the manner in which it would now be supported in an action at law" (*Dent v. The Auction Mart Company*, *L. R.*, 2 *Eq.*, 245; *S. C.*, 35 *Law J. Rep.*, *N. S.*, *Ch.* 560; and *vide Back v. Stacey*, 2 *Cur. & Payne's R.*, 465). A similar doctrine has been frequently recognized by the English courts, both at law and in equity. Said Parke, B., in submitting a case to the jury: "A man can bring

no action for the loss of a look-out or a prospect, but he may do so if the light and air which would come to his windows are diminished so as sensibly to diminish the value of his premises for occupation" (*Wells v. Ody*, 7 Car. & Payne's R., 410). And Tindal, Ch. J., in a case before him at *nisi prius*, said: "It is not every possible, every speculative exclusion of light which is the ground of an action; but that which the law recognizes is, such a diminution of light as really makes the premises to a sensible degree less fit for the purposes of business" (*Parker v. Smith*, 5 Car. & Payne's R., 438). To the same effect was the direction to the jury in a case tried before him, when he said: "To sustain this action there must have been a considerable diminution of light, and the merely taking off a ray or two will not be sufficient" (*Pringle v. Warnham*, 7 Car. & Payne's R., 377).

In a recent case before Lord Cranworth, High Chancellor of England, which was one of obstruction to the window lights of a private residence, his Lordship considered: "That what the plaintiff was bound to show was, that the buildings of the defendant caused such an obstruction of light as to interfere with the ordinary occupations of life. The real question was, whether the light was so obstructed as to cause material inconvenience to the occupiers of the house in the ordinary occupations of life" (*Clarke v. Clark*, L. R., 1 Ch. 20; S. C., 35 Law J. Rep., N. S., Ch. 153). And it should be stated that it has been recently held by Kindersley, V. C., in a case before the English Court of Chancery, that in the eye of the law it is the diminution of the value of the dominant tenement caused by the interference with the comfort of its inmates, and not the loss of the personal comfort of the inmates, that entitles the owner to his remedy (*Wilson v. Townsend*, 1 Drew. & Smale's R., 324).

The question in these cases is, whether there has been such a material interference with the light and air reaching the dominant tenement, as to cause material annoyance to those who occupy it, and thus diminish the value of it. Questions on this subject are questions of degree, and are therefore very difficult to deal with. It has been well said, that all that can be done in this respect is, to attend to the special facts in every case as it arises, and then to form an opinion as to whether the obstruction complained of is such as to deprive the complaining party of such a supply of light

and air as he might reasonably calculate on enjoying: Much must depend on the nature and locality of the windows, the supply of light which has been interfered with. And it has been sometimes suggested, that persons who live in towns, and more especially in large cities, cannot expect to enjoy continually the same unobstructed volumes of light and air as fall to the lot of those who live in the country. There would seem to be weight in this suggestion, for it is quite reasonable to make a distinction between houses in town and houses in the country, as to the extent of the right of a dominant tenement to window lights, and there are authorities very strong in favor of the doctrine, although obstruction of light rarely occurs in the country; towns are the places where light is wanted.

In respect to the question with regard to the extent of the right to window lights possessed by tenements used for purposes of business, the authorities are by no means harmonious. Lord Chancellor Westbury held it essential for the complainant to show that the light to his building had been abridged to such an extent, as to detract from the value of the tenement, considered as an integral portion of the premises, as materially to affect the suitability of those premises for the purposes to which they were applied at the time the obstruction occurred, without regard to a possible future destination of the premises, which might change the wants of the tenement (*Jackson v. The Duke of Newcastle* 33 *Law J., N. S., Ch.* 698). While Lord Chancellor Cranworth, at a later date took a different view. He observed: "An attentive consideration of the evidence of the trade witnesses on the one side and on the other has led me to the conclusion, as did the evidence of the architects, that the erection of the new buildings will materially interfere with the quantity of light necessary or desirable for the plaintiffs in the conduct of their business, I desire, however, not to be understood as saying that the plaintiffs would have no right to an injunction unless the obstruction of light were such as to be injurious to them in the trade in which they are now engaged. * * * Therefore, even if the evidence satisfied me, which it does not, that for the purpose of their present business a strong light is not necessary, and that the plaintiffs will still have a sufficient light remaining, I should not think the defendant had established his defense unless he had shown that, for whatever purposes the plaintiffs might wish to employ the

light, there would be no material interference with it." It should be observed, however, that Lord Cranworth considered the right conferred or recognized by the statute 2 and 3 Will., 4 c, 71, to be an absolute indefeasible right to the enjoyment of the light without reference to the purpose for which it had been used, and his conclusion seems to have been based somewhat upon that (*Yates v. Jack*, *L. R.*, 1 *Ch.* 295; *S. C.*, 35 *Law J. R.*, *N. S.*, *Ch.* 539). Here is an apparent conflict of high judicial opinion upon the subject, and it does not appear that any rule has been settled by later decisions in England. The strong probability, however is, that the rule which will ultimately be adopted under the present laws of parliament there, will be, that the right to window lights extends not only to light and air sufficient for the purposes for which the dominant tenement is for the time being employed, but to light and air sufficient for any purposes for which it may reasonably be employed. This must be understood, however, as applying to the tenement in use at the time the right to light and air matured. The purposes of the premises cannot be changed, so that more light may be required than was originally enjoyed. Said Macdonald, C. B., in a leading English case: "It was not enough that the windows were, to a certain degree, darkened by this wall, which the defendant had erected on his own ground. The house was entitled to the degree of light necessary for a malt-house, not for a dwelling-house. The converting it from the one to the other could not affect the rights of the owners of the adjoining ground" (*Martin v. Goble*, 1 *Camp. R.*, 320; and *vide Garritt v. Sharpe*, 3 *Adolph. & Ell. R.*, 325). And said Wood, V. C., in a late case, in approving the judgment of Lord Cranworth, before referred to: "The Lord Chancellor's observations might apply to the user of a house as it stands for any purpose to which it might be applied in that condition, not to the user of a house where its whole character has been changed, and it has been rebuilt" (*Dent v. The Auction Mart Company*, *L. R.*, 2 *Eq.*, 249; *S. C.*, 35 *Law J. R.*, *N. S.*, *Ch.*, 563).

It has also been repeatedly decided by the English courts, that the owner of the dominant tenement is not entitled to the uninterrupted access of more light and air than other persons find sufficient for the same business. And again, where the persons entitled to the enjoyment of the light have at times lessened the amount of light which has access to their premises, they are not

limited to the minimum quantity which they have used, but will be entitled to an uninterrupted supply of the full quantity to which they were originally entitled. Said Lord Cranworth, in a case before referred to: "The evidence satisfies me that for some purposes of their (the plaintiffs') trade it is necessary at times to exclude the direct rays of the sun, and that in what is called sampling, a subdued light may be better than direct sunlight. But this is not the question. It is comparatively an easy thing to shade off a too powerful glow of sunshine, but no adequate substitute can be found for a deficient supply of daylight" (*Yates v. Jack*, *L. R.*, 1, *Ch.* 297; *S. C.*, 35 *Law R.*, *N. S.*, *Ch.* 543). And said Wood, *V. C.*, in a case before referred to: "Every now and then where the light is too much, people pull down their blinds; but that is no reason, because they accommodate the light to their work, that they should be deprived of it at all times" (*Dent v. The Auction Mart Company*, *L. R.*, 2 *Eq.*, 251; *S. C.*, 35 *Law J. R.*, *N. S.*, *Ch.*, 564).

The right to the enjoyment of light and air, may be lost, however, after it has been acquired, and the general remark may be made, that the modes of the loss of the right correspond to the modes of its acquisition. Where the right is acquired by occupancy, it may be lost by abandonment; when by express grant, it may be lost by express release, and when by implied grant from the disposition of the owner of two tenements, it may be lost by a union of the two tenements. These general observations will give a fair understanding of this branch of the subject, but it will be made plainer by a reference to a few leading authorities.

In respect to the loss of the right to window lights by abandonment, Lord Ellenborough observed in disposing of a case before him at *nisi prius*: "Where a window has been shut up for twenty years; the case stands as though it had never existed" (*Lawrence v. Obee*, 3 *Camp. R.*, 514). And it is well settled that a cessation of the enjoyment of the right for a much shorter period will put an end to it, if the intention of the owner of the dominant tenement to abandon it be manifest. Said the court in one case: "There is nothing unreasonable in holding that a right which is gained by occupancy should be lost by abandonment" (*Liggins v. Inge*, 7 *Bing. R.*, 693). But the subject was elaborately considered at a later date in the English Court of King's Bench, in a case which is often quoted and recognized as a leading authority

upon the point. A verdict was directed for the plaintiff in the case, but a right was reserved to the defendant to move to enter a nonsuit, and in deciding the motion, Abbott, Ch. J., said: "It seems to me, that if a person entitled to ancient lights pulls down his house and erects a blank wall in the place of a wall in which there had been windows, and suffers that blank wall to remain for a considerable period of time, it lies on him at least to show, that at the time when he so erected the blank wall, and thus apparently abandoned the windows which gave light and air to the house, that was not a perpetual, but a temporary abandonment of the enjoyment; and that he intended to resume the enjoyment of these advantages within a reasonable time." Bayley, J., said: "The right to light, air, or water, is acquired by enjoyment; and will, it seems to me, continue so long as the party either continues that enjoyment, or shows an intention to continue it. I think that, according to the doctrine of modern times, we must consider the enjoyment as giving the right; and it is a wholesome qualification of the rule to say, that the ceasing to enjoy destroys the right, unless at the time when the party discontinues the enjoyment he does some act to show that he means to resume it within a reasonable time." And Littledale, J., said: "The right is acquired by mere occupancy, and ought to cease when the person who so acquired it discontinues the occupancy" (*Moore v. Rawson*, 3 Barn. & Cres. R., 332; S. C., 10 Eng. C. L. R., 99).

It has been sometimes contended that the privilege of ancient windows is lost by alteration or improvement of the frame work and glazing, without either their size, shape, or position being altered. But the doctrine of abandonment has never been carried to this extent. If the owner makes alterations merely in the framework or glazing of his window, not altering the position or the size of the apperture in the building, he has a right to do so without losing his privilege (*Jackson v. Duke of Newcastle*, 33 Law J. R., N. S., Ch. 702; and *vide Turner v. Spooner*, 1 Drew. & Smale's R., 473; *Renshaw v. Bean*, 18 Queen's Bench R., 112; *Hutchinson v. Copestake*, 8 Com. Bench R., N. S., 102; S. C., 9 ib., 863; *Martin v. Heaton*, 11 Jur. N. S., 5; *Weatherly v. Ross*, 1 H. & M. R., 349; *Tapling v. Jones*, 11 House of L. Cas., 290; S. C., 34 Law J. R., N. S., C. P., 342; S. C., 12 Com. B. R., N. S., 826). The doctrine is well settled that where the right to window lights is acquired by occupancy, it may be lost by

abandonment, and, under certain circumstances, the alteration of the windows of the dominant premises gives a right to obstruct the light, but where this alteration leaves the servitude imposed on the other tenement unaffected or diminished, no right will be lost by the alteration.

In respect to the loss of the right to window lights by express release, it may be affirmed that in order to effect the extinguishment by this means, a release under seal is requisite, upon the same principle that the right can only be acquired in the first place, except by a grant or covenant under seal. And in the third place, the right to window lights may be lost by unity of possession; that is, where the dominant and the servient tenement become the property of the same owner, the right to light and air, enjoyed by the one over the other, is extinguished. It is a rule in respect to all easements, that where the title to the dominant estate and to the servient estate unite in a common owner, the easement is merged and lost. But in order that the unity of possession of the two tenements should have this effect, the owner in whom they are united must have an equally high and perdurable estate in fee simple in the one as in the other, in the dominant as in the servient tenement. Otherwise the easement, though necessarily suspended so long as the union of ownership continues, is not extinguished, but revives on a severance of the ownership (*Simper v. Foley*, 2 *Johns. & Hemming's R.*, 563). However, if the unity of possession is in a common owner, on separate conveyances of the estates by such owner, the easement is not revived, nor treated as having existed during the time the two estates were in the common owner, but are re-created by the conveyance of the estate separately, and arise from an application of the familiar principle, that whoever grants a thing, impliedly grants whatever may be necessary for the beneficial enjoyment of the thing granted (*Miller v. Lapham*, 44 *Vt. R.*, 416). Unity of seisin is sufficient of itself to cause the extinguishment of an easement without actual unity of occupation (*Stoll v. Stoll*, 16 *East's R.*, 343; *Clayton v. Corby*, 2 *Gale & Dav. R.*, 174). But the momentary seisin of a release to uses has been held not to operate to extinguish an easement by unity of seisin (*James v. Plank*, 4 *Adolph. & Ell. R.*, 766). It may be observed that, however the right to window lights may have been acquired, the same may be extinguished or lost in either of the ways herein described. In those

States where the right cannot be acquired by occupancy or implied grant, the right, when acquired in the way recognized in such States, may be extinguished or lost by abandonment, or the union of the dominant and the servient tenements in the same owner.

A few additional remarks may be necessary in respect to the enjoyment of the right to light and air under special covenants from the owner of the servient estate. In most cases, where it has been desired to secure the enjoyment of the right to window lights by an express agreement, the object has been attained by the owner of the adjoining land entering into covenants restricting him from using his land in a certain specified manner; not by a simple covenant that he will not interfere with his neighbor's right to such window lights. These covenants will not, except as between landlord and tenant, run with the land so as to bind it in the hands of an assignee. This subject has been briefly referred to in a previous chapter. In order to enforce such an agreement as against assignees, recourse must be had to a court of equity, where an adequate remedy may be had, provided the parties had notice of the covenants, in respect to the right. The principle on which courts of equity will enforce such covenants on an owner of the servient property, who at law would be unaffected thereby is, that as he has notice of the restrictions to which the land was subject under such covenants in the hands of the person from whom he purchased, his conscience is affected thereby, and he cannot be permitted to use the land in a manner inconsistent therewith. This doctrine has been well settled by numerous decisions of the courts, although but few cases can be found wherein the precise question of the right to window lights was involved. But the general doctrine is uniformly recognized, that a covenant which at law will not run with the land, is binding in equity upon an assignee with notice, except in the presence of special circumstances which would render it inequitable to enforce the covenant (*Vide Tulk v. Moxhay*, 11 *Beav. R.*, 571; *Whitman v. Gibson*, 9 *Sim. R.*, 196; *Munn v. Stephens*, 15 *ib.*, 377). Courts of equity will, however, act with caution in enforcing covenants of this nature, and will neither too hastily infer their existence, nor will extend their operation beyond what the construction of the instrument requires (*Feoffees of Heriot's Hospital v. Gibson*, 2 *Dow R.*, 301). And of course a court of equity will not strain the natural expression of the terms of the covenant, for the bene-

fit of the covenantees (*Vide Schreiber v. Creed*, 10 *Sim. R.*, 9; *Patchin v. Dubbins*, 1 *Kay's R.*, 1).

It has been declared by the English Court of Chancery, that where land has been conveyed subject to a covenant that the purchaser shall not use the land conveyed to him in a particular manner, such restriction being imposed with a view to the enjoyment of adjoining lands by the vendor, and the character of these adjoining lands is so altered by the acts of the vendor and those claiming under him that the restriction is no longer applicable according to the intent and spirit of the covenant, a court of equity will not interfere to enforce the covenant (*The Duke of Bedford v. The Trustees of the British Museum*, 2 *M. & R. R.*, 552). On a similar principle, a court of equity will not lend its assistance to enforce covenants of this nature, where the covenants were intended to secure the erection of buildings on one general plan for the common benefit of the occupiers of all the buildings, and the covenantee has acquiesced in such deviations from this plan, as will prevent the intended general benefit (*Vide Roper v. Williams, Turner & Russell's R.*, 18). But this doctrine will not be strained in order to include cases in which the covenants do not really form part of one plan (*Patchin v. Dubbins, supra*). The defense, that the plaintiff has acquiesced in the infringement of a general plan for the common benefit, cannot be raised where the question lies solely between covenantor and covenantee. But in these cases if there be acquiescence on the part of the covenantee in the breach of the covenant, or delay by him in complaining thereof, the court will, on its ordinary principle, refuse to interfere in his behalf (*Roper v. Williams, supra*; *Coles v. Sims*, 1 *Kay's R.*, 56; *S. C.*, 5 *De Gex., M. & Gor. R.*, 1).

CHAPTER XLIX.

THE REMEDIES FOR INJURIES TO THE RIGHT TO WINDOW LIGHTS — THE REMEDY BY ACTION AT LAW — REMEDY BY SUIT IN EQUITY — THE EVIDENCE IN SUCH CASES.

THERE are practically two remedies for the obstruction to the right to window lights, viz, by action at law, and a suit in equity.

In early times, another remedy was applied in such cases, viz, abatement by the party injured, but this was always attended with violence, and has long since fallen into disuetude in all civilized countries.

The action at law for injury to the right to window lights may be brought by the party in possession of the dominant tenement for the disturbance of his enjoyment, however temporary its character, and the reversioner may also sue if the injury be of a permanent character and detrimental to the inheritance. This doctrine is well settled by analogous cases, both English and American (*Vide Wells v. Odey*, 1 *Mees. & Wels. R.*, 452; *Foley v. Wyeth*, 2 *Allen's R.*, 135). To enable the reversioner to bring the action, the injury must be of a permanent nature; but it will be considered to be so, if it be such as may possibly be detrimental to the reversioner's title, or afford evidence against the existence of the right (*Shadwell v. Hutchinson*, 2 *Barn. & Adolph. R.*, 97; *Jesson v. Gifford*, 4 *Bur. R.*, 2141; *Hopwood v. Schofield*, 2 *Mood. & Rob. R.*, 34; *Metropolitan Association v. Patch*, 27 *Law J. R., N. S., C. P.*, 330; *Bower v. Hill*, 1 *Bing. N. C.*, 555). The action may be brought either against him who erects the nuisance, or against him who continues it when erected. If the owner of premises erect an obstruction to his neighbor's ancient lights, and then demise his premises in that condition, he is liable if the obstruction is continued by his tenant (*Roswell v. Prior*, 2 *Salk. R.*, 460; *Vide Jones v. Williams*, 11 *Mees. & Wels. R.*, 176; *Rex v. Pedley*, 1 *Adolph. & Ell. R.*, 827).

In respect to the remedy in these cases by suit in equity, the courts are more liberal at present than formerly. It was once almost uniformly held in England, that a court of equity would not grant relief for an injury to the right to window lights, until the right had been determined by a court of law; and though occasionally the court would interfere by injunction, before the determination of the legal right, yet instances of such interference were very rare. Courts of equity gradually extended the exercise of their jurisdiction in such cases, until 1834, when Lord Brougham, the High Chancellor stated the principles on which the court then acted, as follows: "If the thing sought to be prohibited is itself a nuisance, the court will interfere to stay irreparable mischief, without waiting for the result of a trial; and will, according to the circumstances, direct an issue or allow an action,

and, if need be, expedite the proceedings, the injunction being in the meantime continued. But where the thing sought to be restrained is not unavoidably and in itself noxious, but only something which may, according to circumstances, prove so, the court will refuse to interfere until the matter has been tried at law, generally by an action, though in particular cases, an issue may be directed for the satisfaction of the court, where an action could not be framed to suit the question. It is always to be borne in mind that the jurisdiction of this court over nuisance by injunction at all is of recent growth, has not until very lately been much exercised, and has at various times found great reluctance on the part of the learned judges to use it, even in cases where the thing or act complained of was admitted to be directly or indirectly hurtful to the complainant" (*Earl of Ripon v. Hobart*, 3 *Myl. & Keen's R.*, 179). On these principles, a court of equity would seldom be called upon to exercise its jurisdiction in cases of ordinary obstruction of window lights; but a great change has been made in the power of courts of equity to decide questions of this nature in England, by an act of parliament, and in this country, courts of equity are more inclined to interfere in cases of this description, at the present day than formerly. It has now become a familiar rule here, that an injunction will be granted to prevent and restrain a nuisance, and it will be allowed at the instance of the individual who sustains a special injury from it. This doctrine applies to the ordinary case of obstruction to window lights, where the right to the same has been acquired. The owner or occupant of the servient tenement is under obligation not to interfere unnecessarily and essentially with the right, and obstructing the light would be a violation of the obligation, a continuance of which violation a court of equity may interpose to prevent, and not only to prevent, but to compensate in damages for any injury sustained; for it is a settled principle that a court of equity having acquired jurisdiction of the subject-matter of the action, may make complete reparation to the parties (*Story's Eq. Jur.*, §§ 796, 797). In regard to private nuisances, the interference of courts of equity by way of injunction, is undoubtedly founded upon the ground of restraining irreparable mischief, or of suppressing oppressive and interminable litigation, or of preventing multiplicity of suits. But Judge Story says "there must be such an injury as from its continuance or permanent mischief, must occa-

sion a constantly recurring grievance, which cannot be otherwise prevented but by injunction ;” and he enumerates the destruction of water-courses as being of that description (*Story’s Eq. Jur.*, §§ 925, 927). And as pertinent to this subject, it may also be observed, that it has been frequently decided that courts of equity have concurrent jurisdiction with courts of law, in a case of private nuisance for diverting or obstructing an ancient water-course, and may issue an injunction to prevent the interruption (*Gardner v. Newburgh*, 2 *Johns. Ch. R.*, 162 ; *Van Bergen v. Van Bergen*, *Ib.*, 272 ; *Belknap v. Belknap*, *Ib.*, 463 ; *Case v. Haight*, 3 *Wend. R.*, 632 ; *Arthur v. Case*, 1 *Paige’s R.*, 447). Cases of obstruction to window lights are within these principles. Actions at law will seldom do full justice or afford ample relief in such cases ; the injury is usually irreparable and the damage cannot be adequately ascertained or recovered in an action.

But the doctrine has actually been settled in cases involving the precise question of obstructing light and air. In a recent case before the New York Common Pleas, relief was granted. The facts were these : “ The plaintiff owned two lots in the city of New York, upon the rear of which there was a house and lot fronting on a street, in which the plaintiff resided ; and being such owner, he entered into a contract to sell the defendant one of the first-mentioned lots, adjoining the one occupied by the plaintiff as a residence. The agreement of sale contained a stipulation that the deed of said lot should contain “ a restriction against erecting any building on the same within fifteen feet of the rear line, and the usual restrictions against nuisances.” Under this agreement the defendant took possession of the lot contracted to him, and shortly before the commencement of the action he placed boards and other material near said rear line, and threatened to build, and began to erect a wall or fence within the interdicted line, and directly in front of the windows in the plaintiff’s dwelling, in such a manner as to obstruct the lights, and destroy, or greatly injure the plaintiff’s house as a dwelling. The court held, that the intent of the parties was that the fifteen feet space, provided for in the agreement, should be left open, to afford light and air upon that side to the building on the rear of the adjoining lot, and that to allow the defendant to put up the fence referred to, would be in direct contradiction of the intent of the parties as expressed in the instrument. An injunction was, there-

fore, granted restraining the defendant from erecting the fence (*Wright v. Evans*, 2 Abb. R., N. S., 308).

Of course, it is not every obstruction to window lights, which will justify a court of equity to interfere by injunction. In order to justify an injunction, the obstruction must be of such a character as to affect the comfort of those dwelling in the house upon the dominant premises, or to make the occupation of the house less beneficial for purposes of business. Said Lord Eldon, in the English Court of Chancery: "The foundation of this jurisdiction, interfering by injunction, is that sort of mischief alluded to by Lord Hardwicke, that sort of material injury to the comfort of the existence of those who dwell in the neighboring house, requiring the application of a power to prevent, as well as remedy an evil, for which damages more or less would be given in an action at law. The position of the building, whether opposite, at right angles, or oblique, is not material. The question is, whether the effect is such an obstruction as the party has no right to erect, and cannot erect without those mischievous consequences which upon equitable principles should be not only compensated by damages, but prevented by injunction" (*The Attorney-General v. Nichol*, 16 Ves. R., 341). And Lord Westbury, in the same high court, made the same distinction, saying: "It is not in every case in which an action can be maintained for the obstruction of ancient lights that an injunction will be granted by a court of equity. Something more is required than that amount of injury for which damages may be recovered at law. As observed by Lord Eldon, this court will not interfere upon every degree of darkening ancient lights and windows; but the standard of the amount of damage that calls for the exercise of the jurisdiction to to grant preventive relief or to prohibit the continuance of the nuisance, has not been defined with any certainty. * * *

Where the obstruction of the ancient lights of a manufactory or business premises renders the buildings to a material extent less suitable for the business carried on in them it is, in my judgment, a case for an injunction, and not merely for compensation in damages. The foundation appears to be, that injury to property which renders it to a material degree unsuitable for the purposes to which it is now applied, or lessens considerably the enjoyment which the owner now has of it. The court considers that injury of this nature does not admit of being measured and redressed by

damages" (*Jackson v. The Duke of Newcastle*, 33 *Law J. R., N. S., Ch.*, 698). It seems now to be well settled, that a court of equity will interfere to protect the right to window lights by injunction, on the simple ground of preventing damage to the property, and will not require a case of injury to personal comfort or convenience to be made out as preliminary to obtaining its assistance (*Vide Wilson v. Townend*, 1 *Drew & Smale's R.*, 327).

It may be suggested, that the ordinary form of injunction is to restrain something intended or threatened by the defendant. But courts of equity have a still more powerful remedy, the *mandatory* injunction. By this they can compel a defendant to undo what he has already done; and this power may be exercised in cases of obstruction to window lights. This doctrine is now fully established, although in a recent case in the English Court of Chancery, the Master of the Rolls decided that the court could not exercise jurisdiction in a case of obstructing ancient lights, and grant a mandatory injunction to remove the obstruction. He considered, laying aside any ingredient of fraud, the rule of equity to be, "that if the injury was complete, if it was done and altogether finished, so that this court could not grant the injunction when the bill was first filed, then equity had no cognizance of the matter" (*Durell v. Pritchard*, 34 *Law J. R., N. S., Ch.*, 599). But on appeal, the Lord Justices expressly negatived the existence of any such rule, although they affirmed the decision of the Master of the Rolls on other grounds. Turner, Lord Justice, after examining the rule laid down by the Master of the Rolls, and the authorities upon the point, said: "I cannot, therefore, venture to go as far as the Master of the Rolls appears to have gone in this case, or to say that relief by way of injunction ought to have been refused in this case upon the mere ground that the damage had been completed before the bill was filed. The authorities upon this subject lead, I think, to these conclusions: That every case of this nature must depend upon its own circumstances, and that this court will not interfere by mandatory injunction except in cases in which extreme, or, at all events, very serious damage will result from its interference being withheld" (*Durell v. Pritchard*, *L. R.*, 1 *Ch.*, 250; *S. C.*, 35 *Law J. R., N. S., Ch.* 225). It should be stated, however, that the court will not grant a mandatory injunction on an interlocutory application. Said Kindersley, V. C.: "It was useless to come for what was called a mandatory

injunction on an interlocutory application. The court would not compel a man to do so serious a thing as to undo what he had done, except at the hearing" (*Gale v. Abbott*, 8 *Jur. N. S.*, 988; and *vide Ryder v. Bentham*, 1 *Ves. Sen. R.*, 543).

Where the right to window lights is admitted or duly established, evidence must then be produced to show that the right has suffered injury. The point which the plaintiff has to prove in cases of this kind is, that his supply of light and air will be so reduced by the operations of the defendant as to render his house uncomfortable for occupation, or less fit for the carrying on there of his accustomed business. This has been sufficiently illustrated and explained in a previous chapter. The evidence brought forward by the plaintiff and defendant respectively to prove and disprove the point, is said to fall into two classes. Firstly, evidence of witnesses as to the actual effect produced by the operations complained of; and secondly, evidence as to the amount of sky area of which the plaintiff has been or will be deprived by those operations, the court drawing its conclusions as to the effect on the plaintiff's premises of this amount of deprivation. In regard to the first class of evidence, it has been before shown that the courts pay no regard to the evidence given by other persons engaged in the same business as the plaintiff, that they are able to carry on that business with no greater amount of light than the plaintiff still has left after the operations of the defendant. This proposition is abundantly sustained by authorities before referred to, and the argument need not be repeated here. In respect to the second class of evidence, it has been properly said, that it consists of information as to the height and width of former buildings now removed or proposed to be removed, and their distance from the plaintiff's premises; and of similar information with respect to new buildings erected or proposed to be erected, and after deductions drawn by scientific men from this information; the real object of all which is to obtain an accurate estimate of the amount of sky area which the plaintiff formerly enjoyed, and of which he will be deprived. Said Kindersley, V. C., in a recent case: "The only value, as it appears to me, in all these cases of the question what is the distance of the intended new building from the building in question, or the skylight in question; or what is the height of that new building at that distance; or what is the width of that new building at that distance? The

only value of all these considerations is, that they constitute data from which you are to measure the area of sky which will be shut out by the new buildings. That is the only real value of them ; of course it is very necessary to be tolerably accurate for that purpose. But the object is to measure the area of sky which the defendant's buildings will shut out from the plaintiff's ancient windows or ancient lights. And when I say the amount of sky which the defendant's building will shut out, of course it must mean the area of sky which it will shut out more than the old building would shut out ; because, of course, the new building is only responsible for the additional area of sky which it shuts out beyond what was shut out by the old building." And in the same case, the learned Vice-chancellor made the following valuable observations in respect to the mode of estimating the sky area in such cases: "In an ordinary window, that is, a window which is in a vertical frame, and which itself, of course, stands vertically, the quantity of area of sky, supposing there be no impediment at all, is measured, of course, by 180 degrees horizontally, and ninety degrees vertically, because behind the zenith it can derive no light. If it were a horizontal skylight, a skylight perfectly level with the horizon, it would derive light, that is, light might come to it, from the whole vertical area of ninety degrees on one side, and ninety degrees on the other, making 180 degrees. If it is neither vertical nor horizontal, it will derive light from an area to be measured vertically having regard to the number of degrees that the slope of the building is from the perpendicular, because you must add that slope from the perpendicular" (*Shone v. The City of London Real Property Company, [Limited], May 8, 1866, not reported except in Latham's Law of Window Lights, 228, 229*). These observations of the learned Vice-chancellor are important, and lay down rules which are very necessary to be understood, and could only have been settled by calculation, study and care. If a jury be summoned to decide the question, it has been said that they ought to judge rather from their own ocular observation than from the testimony of any witnesses, however respectable, of the degree of diminution which the plaintiff's ancient lights have undergone (*Vide Back v. Stacey, 2 Car. & Payne's R., 466*). But if the premises no longer exist in the former state, the view of a jury would be of no service. Said Wood, V. C., in a case before referred to: "The benefit of a view,

which was also pressed upon me, I think is a good deal exaggerated. If the jury could have had an opportunity of viewing the premises as they existed a year ago, and could be taken to view them as they exist now, the view might be very serviceable. But as it is, I confess I think that by the view the jury is exceedingly likely to be prejudiced; for where a jury view premises as they are, without the slightest knowledge of what they were before, they may be influenced by the remark that was pressed upon me, but what I think is of no value whatever, namely, why there are plenty of people in London who have not so much light as you have" (*Dent v. The Auction Mart Company*, 35 *Law J. R.*, *N. S.*, *Ch.* 566; *S. C.*, *L. R.*, 2 *Eq.*, 254). And it would seem from the remarks of Lord Westbury, in a case before referred to, that it would be improper for the judge before whom the case was tried, to make a personal inspection of the premises. He should decide the case according to the evidence produced in court, and then if error is committed, the party may have his redress by appeal (*Vide Jackson v. The Duke of Newcastle*, 33 *Law J. R.*, *N. S.*, *Ch.* 701).

As a question of *practice*, it may be observed that the Supreme Court of the State of Illinois has held, that in an action for obstructing air and light to the windows of a house, the declaration need not prescribe for ancient lights, but that the common-law prescription for use and enjoyment for a time whereof the memory of man runneth not to the contrary, may be shown in evidence (*Gerber v. Grabel*, 16 *Ill. R.*, 217). This may not only indicate the doctrine of the court upon the question of practice, but also upon the general subject of the right to window lights as well. And here the discussion of the whole subject is closed.

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